

ZIMMERMAN REED LLP

Christopher P. Ridout (SBN 143931)

E-mail: christopher.ridout@zimmreed.com

Caleb Marker (SBN 269721)

E-mail: caleb.marker@zimmreed.com

2381 Rosecrans Ave., Suite 328

Manhattan Beach, CA 90245

(877) 500-8780 Telephone

(877) 500-8781 Facsimile

ZIMMERMAN REED LLP

Brian C. Gudmundson (*pro hac vice* anticipated)

E-mail: brian.gudmundson@zimmreed.com

Michael J. Laird (*pro hac vice* anticipated)

E-mail: michael.laird@zimmreed.com

80 S 8th Street, Suite 1100

Minneapolis, MN 55402

(612) 341-0400 Telephone

(612) 341-0844 Facsimile

CORBOY & DEMETRIO, P.C.

William T. Gibbs (*pro hac vice* anticipated)

E-mail: wtg@corboydemetrio.com

33 N. Dearborn, Suite 2100

Chicago, IL 60602

(312) 346-3191 Telephone

(312) 346-5562 Facsimile

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KELLI EWEN, Individually, and as
Personal Representative of the Estate of
TODD EWEN, Deceased,

Plaintiff,

v.

NATIONAL HOCKEY LEAGUE, NHL
ENTERPRISES, LP., and NATIONAL
HOCKEY LEAGUE BOARD OF
GOVERNORS (COLLECTIVELY,
"NHL"),

Defendants

CASE NO.: 2:19-CV-03656

COMPLAINT

1. Negligence
2. Failure to Warn
3. Fraudulent Concealment
4. Wrongful Death
5. Loss of Consortium

(Plaintiff Demands Trial by Jury)

INTRODUCTION

1
2 1. For almost a century, medical professionals have known that blows to the
3 head cause long-term, progressive neurological disorders. Once called Dementia
4 Pugilistica, the disease that boxers historically have suffered from is now known as
5 Chronic Traumatic Encephalopathy (“CTE”), and it affects athletes in contact sports
6 other than boxing, including players of ice hockey.

7 2. The brain does not distinguish hits to the head that occur in a boxing ring
8 from those that occur on an ice rink. As one of the few remaining leagues of any sport
9 sanctioning fighting, the NHL allows and actively encourages its players to dish out and
10 receive blows to the head during fights. NHL players, like boxers, are not immune from
11 the cumulative damages of repeated hits to the head, and recently, a string of former NHL
12 players have been diagnosed with the disease historical associated with boxers – CTE. A
13 growing number of former NHL “Enforcers,” (*i.e.* players who are responsible for
14 levying big hits on opponents and fighting to protect their teammates and intimidate their
15 adversaries) have died young and tragic deaths, and were later diagnosed with CTE.

16 3. Sadly, Todd Ewen, a former NHL Enforcer, has joined the list of NHL
17 players that died young and tragically. Despite an earlier, flawed neuropathological exam
18 that did not find Todd Ewen’s CTE, a proper evaluation confirmed, like the other NHL
19 Enforcers, Todd Ewen’s Brain had CTE.

20 4. Todd Ewen played from 1986 to 1997 in the so-called golden age of fighting
21 in the NHL. His 11 seasons included three seasons with Anaheim Mighty Ducks,
22 including their inaugural season in 1993, and one season with the San Jose Sharks. Early
23 on in his career in the NHL, Todd was typecast as an Enforcer because of his formidable
24 size and speed. In his first full season in the NHL, Todd twice took down Bob Probert,
25 one of the most feared fighters of his time, earning him the nickname of “The Animal.”
26 Todd soon became one of the premier Enforcers in the league. For example, while in
27 Anaheim, Todd’s primary responsibility was to protect the team’s skill players. In just
28 three years with Anaheim, Todd fought almost 60 times, accounting for over a third of

1 his fights in the NHL. In fact, Todd's two most prolific fighting seasons were both in
2 Anaheim – the 1993-94 season in which Todd fought 24 times and the 1995-96 season in
3 which Todd fought 27 times.

4 5. Although Todd disliked fighting, he knew that should he decide not to fight,
5 he would have no place in the NHL. Fighting was a means to stay in the NHL and provide
6 for his family. Over 11 seasons, Todd participated in 150 documented fights, averaging
7 at least one fight per month for his entire career, and reaching an average of 4 fights per
8 month in some seasons.

9 6. Todd experienced numerous blows to the head during his bare knuckled
10 fights in the NHL. Videos displayed on youtube.com and hockeyfights.com evidence the
11 vicious hits Todd Ewen took, and gave out, in his fights. Unlike boxing, however,
12 fighting was not Todd's only exposure to head hits. Rather, during NHL gameplay, Todd
13 experienced and suffered numerous hits to the head from checks, collisions, sticks, and
14 being thrown against the boards, causing numerous head hits throughout his career.

15 7. Although Todd did not realize the repeated head hits he experienced caused
16 cumulative, permanent damage to his brain, the NHL fully knew of the consequences.

17 8. For decades, medical researchers knew that repeated head hits caused long-
18 term neurocognitive issues. Starting in the early 1900s, researchers recognized that head
19 hits occurring during fights accumulated and caused long-term neurocognitive condition,
20 but the NHL continues to this day to allow fights. By 1937, medical professionals
21 recommended that players who had suffered a concussion should be removed from any
22 sporting events with personal contact, but up until the late 2000s, NHL players frequently
23 returned to play after concussions. In the 1950s, researchers recommended that any
24 player who receives three concussions should be removed from contact sports in their
25 entirety, and yet NHL players received numerous concussions but were never encouraged
26 to retire or leave the sport.

27 9. Medical researchers have also long known of the permanent and cumulative
28 effect of repeated head hits. By 1962, medical professionals believed that it was

1 “questionable whether the effects of concussions, however slight, are ever completely
2 reversible” and that after repeated concussions, there is “gradual appearance of
3 permanent sequelae.” Moreover, in the 1970s, researchers had rejected the notion of a
4 “ding” or “bell-ringer”, noting that such terms referred to concussions and those
5 concussions can occur without loss of consciousness. In 1975, *The Lancet* published an
6 article emphasizing that “doctors do have a duty to convince the controlling bodies and
7 participates in sports where concussion is frequent that the effects are cumulative and that
8 the acceptance of concussion injury, although gallant, may be very dangerous.” By the
9 1980s, neurological researchers specifically argued that the “occurrence of permanent
10 damage (traumatic encephalopathy) in boxing and in jockeys . . . may occur in other
11 sports,” linking Dementia Pugilistica with sports like hockey.

12 10. All of this research occurred *before* Todd Ewen began his NHL career.
13 Given the numerous medical professionals employed by the NHL and its supposed
14 interest in player safety, the NHL cannot assert ignorance of the research on repeated
15 head hits and concussions. By 1986, when Todd played his first NHL game, the NHL
16 knew or should have known of the dangers of concussions and repeated head hits of any
17 degree, and the fact that such head hits may cause lasting cognitive deficits. Despite its
18 knowledge of the long-term effects of repeated head hits, the NHL continued to push for
19 violence and fighting in its leagues for the sake of profits.

20 11. The cumulative effect of the blows to the head Todd suffered during fights
21 and the numerous head hits and concussions he experienced during regular NHL
22 gameplay took their toll. By the time Todd was in his 40s, just over a decade after he
23 retired from the NHL, Todd had started suffering from cognitive deficits, mood swings,
24 impulsivity, confusion, behavioral changes, dizziness, memory loss, ringing in his ears,
25 and nausea. Although Todd had built a successful personal and professional life after
26 hockey, he suffered from severe behavioral, mood, and cognitive dysfunction due to his
27 brain degeneration.
28

1 12. Todd steered away from drugs and alcohol that negatively affected the lives
2 of some former NHL players, but he still suffered similar neurocognitive symptoms. As
3 more of his former NHL colleagues were diagnosed with CTE, Todd feared that he had
4 CTE.

5 13. On September 19, 2015, Todd tragically committed suicide at the age of 49.

6 14. Kelli Ewen, Todd's wife of 26 years was traumatized by Todd's death. The
7 St. Louis Blues Alumni Association contacted Kelli Ewen to help arrange for Todd's
8 brain to be autopsied by Dr. Lili-Naz Hazrati, a neuropathologist of the Canadian
9 Concussion Centre ("CCC"). Unbeknownst to Kelli at the time, the NHL would be
10 disclosing Dr. Hazrati as one of its experts in the NHL Concussion Litigation MDL
11 proceedings.

12 15. Dr. Hazrati performed a neurological evaluation of Todd's brain, and
13 determined that he did not have CTE and broadcast her conclusions throughout multiple
14 news media outlets. Hazrati's erroneous conclusions have since been used by many to
15 undermine the relationship between head hits and CTE and to downplay the existence
16 and seriousness of CTE. The NHL used Todd Ewen's story to justify its continued
17 rejection of CTE and its failure to adjust the game to prevent further head injuries. Dr.
18 Hazrati herself, in a published scientific paper, claimed that Todd's death was not a result
19 of CTE, but a result of media fearmongering, stating:

20 Many news outlets are citing suicidality, dementia, and executive
21 dysfunction as inevitable in the end stages of CTE, resulting in a self-
22 fulfilling prophecy for some who fall into the "at-risk" population of contact
23 sports players. For example, a professional hockey player [Todd Ewen]
24 presented with some common symptoms of CTE and was convinced he had
developed the disease. The player committed suicide, but postmortem
examination revealed no pathological evidence of CTE.

25 16. NHL Commissioner Gary Bettman parroted NHL litigation expert Dr.
26 Hazrati's sentiments in his response to Connecticut Senator Richard Blumenthal's
27 inquiry into the NHL's denial of the connection between blows to the head and long term
28

1 neurological issues. Regarding Todd Ewen's suicide, Bettman quoted Hazrati's
2 erroneous findings and asserted,

3 This, sadly is precisely the type of tragedy that can result when plaintiffs'
4 lawyers and their media consultants jump ahead of the medical community
5 and assert, without reliable scientific support, that there is a causal link
6 between concussions and CTE.

7 17. Dr. Hazrati's findings and the NHL's exploitation of Todd's case
8 traumatized the Ewen family who strongly believed Todd had CTE and that CTE had
9 prompted his suicide.

10 18. Kelli sought to have Todd's brain tissue re-examined by the Boston
11 University CTE Center ("BU"). BU's Dr. Ann McKee, one of the world's foremost
12 experts on CTE, subsequently obtained Todd's brain tissue from Dr. Hazrati. Dr. McKee
13 obtained and examined both previously untested tissue and the tissue slides Dr. Hazrati
14 examined to reach her conclusion that Todd did not have CTE.

15 19. Dr. McKee performed her standard neuropathological evaluation and
16 posthumously diagnosed Todd Ewen with Stage II CTE. Dr. McKee did so despite a
17 much smaller sample of tissue to work with, and concluded that Dr. Hazrati's faulty
18 findings were likely due to faulty tissue processing and incomplete sampling.

19 20. When confronted with the results, Dr. Hazrati admitted Boston University's
20 findings were correct. However there has been no retraction, by Dr. Hazrati or the NHL,
21 of their use of Todd Ewen's name to attempt to perpetuate the denial of a connection
22 between repeated blows to the head and serious, long term neurological dysfunction.

23 21. Kelli Ewen brings this suit against the NHL for its egregious treatment of
24 Todd, both during his career in the NHL and after his death. As the representative of his
25 estate, Kelli brings claims for negligence, failure to warn, fraudulent representation, and
26 wrongful death. Furthermore, Kelli Ewen brings a claim on behalf of herself for loss of
27 consortium.
28

JURISDICTION AND VENUE

22. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332 because Plaintiff is a resident of a different state than the Defendant, and the amount in controversy exceeds \$75,000, exclusive of interest, costs, and attorney's fees.

23. This Court has personal jurisdiction over the Defendant because it conducts substantial and continuous business in the State of California, including through its oversight of three NHL teams located in California, two of which Todd Ewen played for, and because Plaintiff's claims arise out of and relate to Defendant's contacts in the State of California. Todd Ewen lived in California and played for teams in California for 4 of his 11 seasons. Todd Ewen played more games in California than in any other state, played more games as a member of Anaheim and San Jose than as a member of any other team from any other state, participated in more fights while a member of Anaheim and San Jose than while a member of any other team and participated in more fights in California than in any other state. Thereby, Todd suffered from the greatest amount of exposure to the repeated head hits that occur in hockey while in the State of California. Todd Ewen's exposure to head hits while he lived and resided in California and played on NHL teams located in California arose out of the NHL's minimum contacts with the State, including the actions the NHL took and omissions it made regarding its oversight of gameplay and player safety for the league that impacted the three NHL franchises that existed (and still exist) in California.

24. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) because a substantial part of the events or omissions that give rise to the claims occurred within this District in the State of California, including that Todd Ewen lived in California and played over 150 games as a member of the Anaheim Mighty Ducks and participated in more fights while he was a member of the Mighty Ducks than while a member of any other team, and the Defendant conducts a substantial part of its business within this District.

1 **PARTIES**

2 25. Plaintiff Kelli Ewen is Todd's widow, having married Todd on July 1, 1989.
3 Kelli and Todd had three sons. After Todd passed away, Kelli was appointed as the
4 personal representative of Todd's estate. Todd Ewen played 11 seasons in the NHL,
5 including three seasons on the Anaheim Mighty Ducks and one season on the San Jose
6 Sharks. Todd and Kelli resided in Anaheim, CA while Todd was a member of the
7 Anaheim Mighty Ducks and resided in San Jose when Todd was a member of the San
8 Jose Sharks. Todd Ewen played in a combined 204 games and participated in 70 fights
9 while a member of Anaheim and San Jose's teams.

10 26. Defendant National Hockey League ("NHL") is an unincorporated
11 association with its headquarters located at 1185 Avenue of the Americas, New York,
12 New York 10036. The NHL is engaged in interstate commerce in the business of, among
13 other things, promoting, operating, organizing, and regulating the major professional
14 hockey league in the United States and Canada. The NHL regularly conducts business
15 in the U.S. and in the Canadian provinces where its 30 member teams reside, including
16 in the, where the Anaheim Mighty Ducks and the Los Angeles Kings are located, both of
17 which are professional hockey teams.

18 **FACTUAL ALLEGATIONS**

19 27. Todd Ewen's NHL career spanned 518 games over 11 seasons, from 1986
20 to 1997. Both before and during Todd's career, medical research had established and
21 confirmed that repeated head hits and concussions caused irreversible brain damage that
22 worsened with each hit, leading to long-term cognitive deficits. The NHL knew, or
23 should have known, of the medical research evidencing the dangers of head hits in sports,
24 and it witnessed firsthand that head hits could prematurely end NHL players' careers and
25 cause devastating neurocognitive deficits later in life. Despite the known long-term
26 consequences of head hits, the NHL fostered and promoted violence and fighting in its
27 games for the sake of increased league revenues. Because of the NHL's sanctioned
28 violence, many players, including Todd Ewen, suffered uncountable head hits throughout

1 their careers. These head hits contributed to Todd Ewen’s later cognitive deficits, his
2 CTE, and his suicide.

3 **I. LONG-TERM NEUROCOGNITIVE DISORDERS HAVE LONG BEEN**
4 **ASSOCIATED WITH REPEATED HEAD HITS IN SPORTS.**

5 **A. Historical Medical Research Had Demonstrated the Long-Term**
6 **Neurocognitive Complications Caused by Repeated Head Hits and**
7 **Concussions Before Todd Ewen’s NHL Career Began in 1986.**

8 28. The long-term neurocognitive complications caused by repeated head hits
9 and concussions have long been known to the medical and scientific community.

10 29. In 1928, pathologist Harrison Martland published the first case analyzing
11 “Punch Drunk” syndrome, a syndrome describing symptoms of neurocognitive declines
12 resulting from repeated blows to the head in boxing. Martland published his study in the
13 prominent *Journal of the American Medical Association*. Martland’s study described the
14 clinical spectrum of abnormalities found in “almost 50 percent of fighters [boxers] . . . if
15 they ke[pt] at the game long enough,” and directly connected those abnormalities to the
16 repeated blows boxers suffered during fights.

17 30. Even before Martland’s study, the idea that repeated head hits caused long
18 term brain degeneration already existed. For example, in 1872, James Crichton-Brown,
19 the founder of *Brain: A Journal of Neurology*, discussed a “cerebral weakness” caused
20 by “concussion, and more especially repeated concussion”¹ Crichton-Brown
21 concluded that a “brain that has sustained an injury . . . will often break down lamentably
22 when an extra load is imposed upon it, or when any visceral derangement supervenes.”²

23 31. Although Martland’s study was the first to link sub-concussive and
24 concussive blows in boxing to degenerative brain disease, by 1936, Edward Carroll, a
25 medical researcher, connected punch drunk syndrome to other professional sports. He

26 _____
27 ¹ James Crichton-Brown, *Cranial Injuries and Mental Disease*, 1 W. Riding Lunatic Asylum Med. Rep.
97, 128 (1872).

28 ² *Id.*

1 wrote: “It is probable that no head blow is taken with impunity, and that each knock-out
2 causes definite and irreparable damages. If such trauma is repeated for a long enough
3 period, it is inevitable that nerve cell insufficiency will develop ultimately, and the individual
4 will become punch drunk.” He warned that “athletes entering into competitions in which
5 head injuries are frequent and knock-outs are common” need to “realize they are exposing
6 themselves not only to immediate injury, but also to remote and more sinister effects.”

7 32. In 1937, the American Football Coaches Association published a report
8 warning that players who suffer a concussion should be removed from sports involving
9 personal contact.

10 33. In 1943, Dr. Charles Symonds, a neurologist, suggested that previous studies
11 of primates showed shear strains and rotational forces caused stretching and compression
12 of the brain and nerves, and the resulting structural damage caused the symptoms of the
13 concussion.

14 34. In 1948, the New York State Legislature created the Medical Advisory
15 Board of the New York Athletic Commission for the specific purpose of creating
16 mandatory rules for professional boxing designed to prevent or minimize the health risks
17 to boxers. After a three-year study, the Medical Advisory Board recommended, among
18 other things: (a) an accident survey committee to study ongoing accidents and deaths in
19 boxing rings; (b) two physicians at ringside for every bout; (c) post-bout medical follow-
20 up exams; (d) a 30-day period of no activity following a knockout and a medical follow
21 up for the boxer, all of which was designed to avoid the development of “punch drunk
22 syndrome,” also known at the time as “traumatic encephalopathy;” (e) a physician’s
23 prerogative to recommend that a boxer surrender temporarily his boxing license if the
24 physician notes that the boxer suffered significant injury or knockout; and (f) a medical
25 investigation of boxers who suffer knockouts numerous times.

26 35. In 1952, August Thorndike published an article in the *New England Journal*
27 *of Medicine* proposing a three-strike rule for concussions in football, recommending that
28 players cease to play football after receiving their third concussion. Thorndike believed

1 that “[p]atients with cerebral concussion that has recurred more than three times or with
2 more than momentary loss of consciousness at any one time should not be exposed to
3 further body-contact trauma.” He further warned that “[b]ody-contact sports should not
4 be permitted for any student athlete who . . . has suffered three cerebral concussions of
5 moderate degree, or one concussion, resulting in the diagnosis of a laceration of the
6 brain.”

7 36. Around the same time, A. G. Gross, a physician and researcher, pushed for
8 the adoption of helmets in contact sports, noting that helmets “provide protection from
9 brain concussions in the case of accidental impact to the head.” Later, Gross, examining
10 “punch drunk syndrome” reasoned that “hard blows to the head” caused “damage to the
11 brain” and that the damage is “cumulative in nature.”

12 37. In 1956, S.J. Strich, a pathologist, analyzed rotational acceleration and found
13 that shear strain forces – like those capable from hits during ice hockey – caused never
14 fiber damages. Strich hypothesized that nerve degradation causes the symptoms of a
15 concussion.

16 38. In 1957, Dr. Macdonald Critchley, a British neurologist, found repeated
17 head trauma in boxers created a tangle pathology characteristic of senility. Dr. Critchley
18 concluded that the condition could be understood generally as a form of chronic traumatic
19 encephalopathy, which he hypothesized to have resulted from multiple minor cerebral
20 contusions and possibly pinpoint hemorrhages, later gliosis (change of the reactivity of
21 glial cells) and cortical atrophy.

22 39. In 1962, Dr. Charles Symonds suggested that it is “questionable whether the
23 effects of concussions, however slight, are ever completely reversible. So far as
24 symptoms are concerned, the patient makes a rapid and complete recovery from a single
25 slight concussion, but after repeated episodes there is gradual appearance of permanent
26 sequelae.” Symonds “therefore surmise[d] that in the patient who has been concussed
27 and recovered, some fraction of his reserve neurons has been lost; and, if the process is
28 repeated, it will only be a question of the number and severity of the inquiries before the

1 results are exhausted and permanent symptoms appear.” Symonds also wrote that “in the
2 most severe degree of concussion there is widespread irreparable damage. In the slightest
3 degree there may be rapid and complete recovery of cerebral function; but this does not
4 necessarily exclude the possibility that a small number of neurons may have perished – a
5 number so small as to be negligible at the time, but leaving the brain more susceptible as
6 a whole to the effects of further damage of the same kind.” Dr. Symonds hypothesized
7 that the accumulated evidence suggested mild concussions could result in nerve cell
8 damages which might have a negligible immediate effect but leaves the brain more
9 susceptible to the effects of further nerve cell damage.³

10 40. A 1963 study by Drs. Mawdsley and Ferguson published in *Lancet* found
11 that some boxers sustain chronic neurological damages as a result of repeated head
12 injuries. This damage manifested in the form of dementia and impairment of motor
13 function.

14 41. A 1967 study by Drs. Hughes and Hendrix examined brain activity impacts
15 from football by utilizing EEG to read brain activity in game conditions, including after
16 head trauma.

17 42. In 1968, D.R. Oppenheimer found that permanent damages can be inflicted
18 on a brain from a concussion and concluded that such injuries, if repeated, would result
19 in progressive, cumulative loss of tissue and of nervous function.

20 43. In 1969, Richard C. Schneider, a leading medical expert in the treatment of
21 head injuries, published a paper in the *Journal of Medicine and Science in Sports*
22 recommending that any concussive event with transitory loss of consciousness requires
23 the removal of the football player from play and requires monitoring. Schneider
24 reiterated his recommendation in a 1973 book entitled *Head and Neck Injuries in*
25 *Football*.

26
27
28 ³ H. Miller, *Mental Sequelae of Head Injury*, 59 Proc. Royal Soc’y Med. 257 (1961).

1 44. In the 1970s, researchers applied concussion-based research to that of minor
2 closed head injuries in sports, specifically examining the effects of “dings” or “bell-
3 ringers.” Yarnell and Lynch, for example, reported the amnesic cognitive effects of a
4 “ding” that occurred to a professional football player who suffered memory loss for
5 approximately 30 minutes after receiving a hit to the head.

6 45. In the 1970s, Clayton, Hamlin and Lewis provided recommendations for
7 concussions in football that made clear their understanding that concussions could occur
8 without loss of consciousness (a long known fact by that time). Their study described
9 varying degrees of a concussion, including a “Cerebral Concussion Acute 1st Degree”
10 which results in “[n]o loss of consciousness; variable symptoms of temporary memory
11 impairment, mental confusion, unsteadiness, tinnitus, and/or dizziness.” Clayton,
12 Hamlin, and Lewis agreed with Thorndike, writing that:

13 It is our conclusion that a player who has suffered three or more 2nd or 3rd
14 degree cerebral concussions has reached a point of ‘diminishing returns.’
15 That is, he has reached a point where each subsequent concussion increases
16 the possibility of permanent damage to the individual. For this reason, after
17 his third 2nd or 3rd degree concussion he should be excluded from
18 competition.

19 46. In 1973, neurosurgeon R.C. Schneider first described a disabling and
20 sometimes deadly condition involving the second impact concussion occurring before
21 symptoms of a first concussion resolve. The study revealed that a re-injury to the already-
22 concussed brain triggers swelling that the skull cannot accommodate. This phenomenon
23 was termed “second-impact syndrome” in 1984 by Dr. R.L. Sanders.

24 47. In 1975, Grownwall and Wrightson published a study in *The Lancet*
25 reporting that “young adults . . . studied after a second concussion” had a reduced “rate
26 at which they were able to process information” as compared to “controls who had been
27 concussed only once” and “they took longer to recover than the controls.” They
28 concluded that the “effects of concussion seem to be cumulative, and this has important
implication for sports where concussion injury is common.” Furthermore, they wrote

1 that “[w]hatever the mechanism for this fall-off in intellectual performance, doctors do
2 have a duty to convince the controlling bodies and participants in sports where concussion
3 is frequent that the effects are cumulative and that the acceptance of concussion injury,
4 although gallant, may be very dangerous.”

5 48. *Grinker’s Neurology*, a common medical textbook, emphasized the dangers
6 of repeat head hits and concussions as early as 1976. The textbook advised that:

7 The clinical picture of cerebral concussion is, therefore, not a simple one.
8 The usual patient loses consciousness briefly, soon recovers and thereafter
9 is without symptoms. It seems likely, however, that although the patient
10 appears to make a complete recovery from one such episode, he cannot hope
11 to do so from repeated ones. The repeated traumatization of nerve cells, such
12 as Windle and his associates have shown, is likely to produce a lasting deficit
13 sooner or later. It is probable that this fact accounts for the change seen in
14 prizefighters who become “punchdrunk.” Definite changes take place in the
15 brains of some fighters.

16 49. By 1980, Kenneth W. Lindsay and other neurologists at the Institute of
17 Neurological Sciences in Glasgow reported that head injuries “producing even a few
18 minutes of post-traumatic amnesia may cause some microscopic structural brain damage
19 and impaired psychological function for two to three weeks. The effects of repeated
20 minor injury are cumulative; the occurrence of permanent damage (traumatic
21 encephalopathy) in boxing and in jockeys has led to the introduction of statutory medical
22 cover in these sports. More recently, it has been suggested that a similar encephalopathy
23 may occur in other sports, including Association football, rugby, and wrestling.”

24 50. In 1981, Rebecca Rimel published a study of 538 patients admitted to
25 hospitals with head injuries and found noteworthy persisting difficulties, leading her and
26 others to conclude that the effect of a concussion, however slight, might not be
27 completely reversible.⁴

28 51. In 1982, *Canadian Medical Association Journal* published an article titled
“Return to athletic competition following concussion.” The article concluded:

⁴ R.W. Rimel, et al., *Disability Caused by Minor Head Injury*, 9 *Neurosurgery* 221 (1981).

1 The basic recommendation is that return to training and competition should
2 be deferred until all associated symptoms such as headaches have
3 completely resolved. The decision to return must take into account the
4 nature of the sport, the athlete's level of participation, and the cumulative
effect of previous concussions. Some athletes will have to avoid any further
participation in their sport.

5 52. In 1986, the *Physician and Sports Medicine* journal published an article by
6 Dr. Robert Cantu, a widely-respected authority on brain injuries from the American
7 College of Sports Medicine, titled "Guidelines for Return to Contact Sports after Cerebral
8 Concussion." Dr. Cantu established a system to grade the severity of concussions based
9 on clear and obvious symptoms and corresponding guidelines for when players should
10 return to play. The Cantu guidelines for return to play are widely accepted and recognized
11 in the medical community as being the most useful guidelines.

12 53. These medical and scientific studies and conclusions, widely available to
13 those seeking to find them, existed *before* Todd Ewen played his first game in the NHL.
14 It is not plausible that the NHL and its medical personnel were unaware of Cantu's widely
15 accepted guidelines or of the numerous studies published before 1986 beginning with
16 Martland's study of boxers and expanding to head hits and concussions in all sports. By
17 1986, medical professionals fully understood repeated concussion, including those
18 without loss of consciousness, had a cumulative effect whereby each progressive hit to
19 the head contributed to worsening cognitive function in the long-term. Moreover,
20 researchers and medical professionals knew and warned of the need to rest players
21 concussed in contact sports to allow for adequate recovery.

22 **B. Medical Research Published During and After Todd Ewen's Career**
23 **Further Established the Significant Cognitive Complications Caused by**
24 **Head Trauma in the NHL.**

25 54. In 1991, the Colorado Medical Society ("CMS") published its Guidelines on
26 Sports Concussion, bringing together decades of research on concussions and head hits
27 in sports. The guidelines "were developed by the CMS Committee on School Health and
28 Sports Medicine in 1990 out of a growing concern that many team physicians in

1 attendance at contact sports events felt uncomfortable when asked to determine whether
2 an athlete could return to the contest following a concussion.” The guidelines emphasize
3 that “[c]oncussion is the most common consequence of head injury in contact sports,”
4 estimating that “more than 250,000 such injuries occur every year in football alone.”
5 While concussion can “occur in any athletic activity, they are most common in football,
6 boxing, horseback riding, swimming, driving, cycling, ice hockey, gymnastics, martial
7 arts, sky diving, rugby, and motorized vehicle racing.”

8 55. The CMS guidelines dismissed the concept of a “ding,” calling “into
9 question the very concept of a ‘minor’ head injury.” The guidelines noted “neuroimaging
10 techniques of magnetic resonance imaging (MRI) and computerized tomography (CT)
11 frequently detect intracranial lesions following mild head trauma, even without loss of
12 consciousness.” Moreover, “[t]ewnty-five percent of athletes with three minor head
13 injuries” and “40% of those with five minor head injuries” presented with “persistent
14 abnormalities on neuropsychological testing 6 months after injury.” By 1991, medical
15 professionals knew of the long-term effects of even mild hits to the head.

16 56. In 1998, a Canadian news article documented how frequent concussions are
17 for NHL players:

18 Concussions have become an epidemic in the NHL over the past several
19 years, striking everyone from marquee players to fourth-line checkers. The
20 rash of concussions has led the NHL to try to improve prevention and
diagnosis of concussions and has awakened many players and coaches.

21 ***

22 According to statistics provided by the NHL, 60 players had concussions
23 last season during the regular season and the playoffs. As of early February
24 this season, 56 players already had received concussions.

25 57. Discussions in the 2001 Vienna International Symposia on Concussions in
26 Sport confirmed that since 1986, doctors worldwide have observed an “alarming”
27 increase in the rate of mild traumatic brain injuries (“mTBI”) in ice hockey players—with
28 the rate of mTBI increasing from 2% in the 1989-1990 season to 8% in the 1999-2001

1 season. The report recommended that “any confused player with or without amnesia
2 should be taken off the ice and not be permitted to play again for at least 24 hours.”

3 58. A 2006 publication stated that “[a]ll standard U.S. guidelines, such as those
4 first set by the American Academy of Neurology and the Colorado Medical Society,
5 agree that athletes who lose consciousness should never return to play in the same game.”
6 That same year, a study comparing eight major contact sports (American football, boxing,
7 ice hockey, judo, karate, tae kwon do, rugby, and soccer), found that ice hockey players
8 have the highest rate of concussions. At the professional level, ice hockey was second
9 only to rugby for the highest rate of concussions.

10 59. For the 2009-2010 season, Dr. Paul Echlin followed two junior hockey clubs
11 to assess their incidence of concussions. The report concluded that 25% of the players
12 on the teams experienced at least one concussion in a 52-game season. Twenty-nine
13 percent of those players endured recurring concussions. Dr. Echlin stated that
14 concussions occurring in hockey may be seven times higher than reported in the then-
15 current literature.

16 60. The Mayo Clinic sponsored two “Conferences on Concussions in Hockey,”
17 one in 2010 and the other in 2013. At the 2013 Conference, Dr. Michael Stuart, a director
18 of the Mayo Clinic Sports Medicine Center and chief medical officer for USA Hockey,
19 noted two recent fights in the NHL that resulted in players receiving concussive head
20 injuries. Recommendations made at that 2013 conference focused on eliminating
21 fighting from NHL gameplay.

22 **C. Research on Former NFL Players Is Relevant to the Neurocognitive**
23 **Issues Experienced by Former NHL Players.**

24 61. The NFL is a strong measuring stick for NHL players. According to reports,
25 NHL players are five times more likely to suffer a concussion than NFL players, which
26 is devastating given that the NFL believes that nearly one in three former NFL players
27 will develop a debilitating brain disease. These numbers are also not surprising; while
28 NFL players play on average four pre-season games and a 16-game season, and engage

1 in only 11-15 minutes of actual playing time per game, NHL players on average play six
2 pre-season games and an 82-game season, and, except for fourth-liners and spare
3 defensemen, play an average of 18-25 minutes per game. Unlike the NHL, the NFL also
4 does not permit any fighting, bare knuckled or otherwise.

5 62. Research on former football players shows a much higher prevalence of
6 neurocognitive disorders as compared to the general public. For example:

- 7 • a 2000 study surveyed 1,090 former NFL players, finding that more than 60%
8 had suffered at least one concussion and 26% had suffered three or more during
9 their careers. Those who had sustained concussions reported more problems
10 with memory, concentration, speech impediments, headaches, and other
11 neurological problems than those who had not been concussed.
- 12 • A later study showed that of the NFL retirees that had sustained one or two
13 previous concussions, 11.5% reported that the injuries have had a permanent
14 effect on their thinking and memory skills as they have aged. Moreover, 11.1%
15 of all respondents reported having a prior or current diagnosis of clinical
16 depression.
- 17 • An October 2005 study of retired professional football players investigating the
18 association between previous head injury and the likelihood of developing mild
19 cognitive impairment (MCI) and Alzheimer's disease found that retired players
20 with three or more reported concussions had a fivefold prevalence of MCI and
21 a threefold prevalence of significant memory problems, compared to other
22 retirees.
- 23 • One study of both active and former NFL players showed that 28% of the
24 players studied suffered from depression, compared to only 9.5% of the general
25 population.
- 26 • A 2009 study performed by the University of Michigan showed that 6.1% of
27 retired NFL players over the age of 50 receive a dementia-related diagnosis
28 compared to the 1.2% national average for men of the same age.
- A 2011 published, peer-reviewed scientific study showed that 36% of former
NFL players, age 65-75, suffered from dementia, whereas the prevalence of
dementia in the general population for the same age group is 2.2-6.5%.

- A November 6, 2012, study analyzing neurodegenerative causes of death among a cohort of 3,439 former NFL players who played between 1959 and 1988 confirmed that the neurodegenerative mortality rate of professional football players is three times higher than that of the general United States population. In fact, the rate of Alzheimer's and ALS in professional football players is four times higher.

63. Former NFL football players also experience high rates of chronic traumatic encephalopathy ("CTE"), an incurable, degenerative brain disease associated repeated head trauma. Early on, CTE causes mood and behavioral changes, including impulsiveness, aggression, depression, and paranoia. As the disease progresses, patients generally experience problems with thinking and memory, including memory loss, confusion, impaired judgment, and progressive dementia.

64. On July 24, 2017, Dr. Ann McKee, a foremost expert on CTE and neuropathologist at Coston University's Center for CTE, published the largest CTE study to date, finding that 110 of 111 (over 99%) former NFL players' tested positive for CTE.

65. On January 18, 2018, Dr. Lee Goldstein and researchers at Boston University published a study showing that repeated head hits even in the absence of signs of concussion led to the development of CTE. The researchers concluded "closed-head impact injury, independent of concussion, represents a potent insult with potential to induce enduring neurophysiological dysfunction and persistent (and possibly progressive) sequelae."

66. In 2018, Boston University's Center for CTE published another study demonstrating participants in contacts sports are at an increased risk of Lewy Body Dementia, a separate cognitive disease from CTE. The Center reported that "the number of years an individual was exposed to contact sports, including football, ice hockey, and boxing, was associated the development of . . . Lewy Body Disease . . . [which is] associated with parkinsonism and dementia." The study examined 694 brains, including 269 former athletes. Of the athlete group, 217 (81.3%) had CTE and 54 (20.2%) had Lewy Body Disease.

1 67. In addition to the prominence of CTE in former NFL players, several NHL
2 players have also been diagnosed with CTE. In January 2010, Boston University, the
3 Veterans Affairs Boston Healthcare System, and Sports Legacy Institute, confirmed for
4 the first time that a former hockey player, New York Ranger Reggie Fleming, had CTE.
5 Reggie Fleming played in the NHL from 1959 to 1974 and was known as one of the most
6 bruising players of his era and a heavy fighter on the ice.

7 68. Rick Martin, best known for being part of the Buffalo Sabres' "French
8 Connection," was posthumously diagnosed with CTE. Martin was the first documented
9 case of a hockey player not known to be a fighter or Enforcer to have developed CTE.

10 69. Within months of Martin's death, four former hockey Enforcers suffered
11 sudden and unexpected deaths: Derek Boogaard, from a combination of painkillers and
12 alcohol; Rick Rypien, of an apparent suicide; Wade Belak, of an apparent suicide; and
13 Bob Probert, known as the heavyweight champion of the NHL and as a member of the
14 "Bruise Brothers," of sudden cardiac arrest. All four players had histories of fighting,
15 blows to the head, and concussions during NHL games. Boston University confirmed
16 that Boogaard and Probert had CTE. The others were not evaluated for possible CTE.

17 70. On June 17, 2014, Larry Zeidel died at the age of 86. Zeidel was a "tough"
18 and "terrific fighter" during his NHL career. He recalled getting in several fights in games
19 and practices, including a stick-swinging bout with Eddie Shack, another heavy hitting
20 NHL player. BU posthumously diagnosed Zeidel with CTE.

21 71. In 2015, Steve Montador died unexpectedly at the age of 35. Montador was
22 a tough defensive player who played in 571 NHL games. His NHL career ended in the
23 2012-2013 season when he suffered a serious concussion that required almost a full year
24 to recover. A neuropathological report found "widespread CTE" that "ravaged"
25 Montador's brain.

26 72. In 2018, Jeff Parker, who played in the NHL for five seasons, died
27 unexpectedly at the age of 53. His family described Jeff as suffering significant cognitive
28

1 issues and severe depression. A neuropathological report revealed Parker suffered from
2 significant CTE, the seventh former NHL player to be diagnosed with the disease.

3 73. For almost a century, while unnecessary violence, including brutal fist-
4 fighting, has permeated NHL games, the NHL has been on notice that repeated blows to
5 the head can lead to long-term brain injury, including but not limited to memory loss,
6 dementia, depression, and CTE and its related symptoms. Legions of studies throughout
7 the eras expounded the negative health consequences of repeated head hits, repeated
8 concussions, and the cumulative effect of head hits and concussions, especially when
9 players are not fully healed from a previous head hit. Despite this medical knowledge,
10 the NHL said nothing to its players about any of it and deliberately refused to institute
11 changes to promote player safety, prevent unnecessary head hits, and ensure injured
12 players are healed before returning to play.

13 **D. CTE Develops from Repeated Exposure to Head Hits and Toxic Level**
14 **of P-Tau.**

15 74. CTE is an “exposure disease,” meaning it develops when an individual is
16 exposed to repeated blows to the head, and more exposure is generally associated with
17 more severe consequences. This fact was recognized in the early 1900’s by Harrison
18 Martland who studied Dementia Puglistica in boxers, and confirmed by CTE researchers
19 studying contact sports like hockey and football. Since Martland, medical researchers
20 have found comparisons in the exposure to repeated head hits suffered by boxers and
21 those suffered by athletes in contact sports.⁵

22 75. CTE is a progressive neurodegeneration characterized by deposition of
23 hyperphosphorylated tau (p-tau) as neurofibrillary tangles that begin at the depots of
24 cerebral sulci in a patch perivascular distribution. CTE is a distinctive tauopathy – a class
25

26 ⁵ *The MacNeil/ Lehrer Report: Ring Commission Hearings*, Am. Archive of Pub. Broadcasting (1983),
27 http://americanarchive.org/catalog/cpb-aacip_507-g44hm5393h (responding to a question asking “can
28 you equate for me the impact of a blow to a boxer’s head with the force of impact in another sport . . .
?”), Dr. Robert Patterson in 1983 compared blows to the head in football and boxing, stating that “small,
repetitive blows . . . [have a] cumulative effect that [leads] to punch-drunk syndrome.”).

1 of neurodegenerative diseases associated with the aggregation of toxic levels of tau
2 protein in neurofibrillary tangles – meaning it can be identified and distinguished from
3 other tauopathies like Alzheimer’s disease. However, a definitive diagnosis of CTE can
4 only be made post-mortem.

5 76. Repetitive hits to the head can trigger the development of CTE. Following
6 a blow to the head, metabolic, cellular and subcellular changes in the brain occur which
7 sometimes cause permanent declines in white matter integrity and neuronal cells in the
8 brain. Each concussive or subconcussive blow that affects white matter integrity, in turn,
9 accelerates the individual’s decline towards a state where neuropathologies, including
10 CTE, manifest. Therefore, CTE results in latent symptoms appearing years after an
11 exposure to repeated head hits as a result of toxic p-tau tangles in certain parts of the
12 brain.

13 77. The biggest risk factor for the development of CTE is repeated hits to the
14 head. Studies of players in the NHL show, over the course of a 30 game period, an
15 average NHL player suffers between 680 and 1,674 head impacts greater than 9% strain.
16 By comparison, the minimal level of strain necessary to inflict neuronal injury is 5%
17 strain. Therefore, an average NHL player suffers between 0.98 and 2.56 head impacts
18 capable of triggering a neuronal injury *every game*.

19 78. Todd Ewen, therefore, were he an average player, would have suffered
20 between 507 and 1,326 head hits capable of disrupting and damaging the neurons in his
21 brain. Todd, however, was not an average player, but rather, an Enforcer whose primary
22 job was to intimidate, hit, and fight members of the opposing team. Todd likely suffered
23 significantly more injurious head hits than an average player because of his role as an
24 Enforcer.

25 79. Just as Martland found, repeated head hits in boxing caused Dementia
26 Puglistia and other neurodegenerative diseases, so too have researchers found that
27 repeated head hits to the brain that occur in contact sports increase the risk of developing
28 CTE. The prolific and significant head hits experienced by NHL players puts players at

1 risk of experiencing toxic p-tau resulting in tauopathies like CTE that cause latent
2 neurocognitive declines.

3 **II. THE HEAD INJURIES THAT OCCURRED IN NHL GAMEPLAY PUT THE**
4 **NHL ON NOTICE OF THE DANGERS OF HEAD HITS AND**
5 **CONCUSSIONS.**

6 80. Along with the clear history of medicine establishing the long known effects
7 of repeated head hits and concussions, the NHL's infamous incidents of violent head
8 impacts and the negative repercussions of such impacts on its players demonstrate the
9 NHL's actual, decades-long knowledge of the consequences of repeated head trauma.

10 81. For example, in 1947, William Ezinicki (known as "Wild Bill") of the
11 Toronto Maple Leafs delivered a crushing check to Edgar Laprade of the New York
12 Rangers that left Laprade sprawled unconscious on the ice with head trauma. Laprade
13 was taken off the ice and was thought to be dead. Laprade wound up in the hospital with
14 a concussion and needed five stitches to close a cut to his head. The bodycheck enraged
15 Frank Boucher, the New York Rangers' head coach and general manager, who decried:
16 "How much longer is Ezinicki going to get away with elbowing, high sticking and
17 deliberate injuries to opponents?" Then NHL president Clarence Campbell claimed
18 Ezinicki's contact with Laprade was legal.

19 82. Early in the career of Gordie Howe, one of the all-time NHL greats, who
20 was not afraid to "throw his weight around," sustained the worst injury of his career,
21 fracturing his skull after colliding with the boards in the 1950 playoffs. The fracture was
22 so severe that Howe had to be immediately taken to a hospital for emergency surgery,
23 drilling a hole into his head in order to relieve pressure on his brain. As a result of this
24 head trauma, Howe developed a permanent facial tic and was nicknamed "Blinky" by his
25 teammates. Howe died with dementia in 2016.

26 83. In 1968, as NHL player Bill Masterton was knocked backwards, hitting his
27 helmetless head on the ice and falling into unconsciousness. Masterton's brain was
28

1 damaged so severely that he never regained consciousness and died two days after the
2 incident.

3 84. In 1988, the Philadelphia Inquirer ran a story titled *Hazardous Despite a*
4 *Player's Death, Helmets Were Long Ignored*. The article recounted Masterton's death in
5 1968 and criticized the NHL's cavalier attitude toward player safety:

6 On Jan. 17, 1968, the NHL Players Association (NHLPA) issued a
7 statement urging the league to adopt mandatory helmet legislation.

8 Chicago's Stan Mikita, the league's MVP that year, and others began
9 wearing helmets immediately after the death. Blackhawks superstar Bobby
10 Hull admitted that vanity alone had kept him from using a helmet and said
11 that he would consider using one.

12 The NHL, though, remained unmoved.

13 Clarence Campbell, the imperious commissioner who refused to lend
14 league sanction to a benefit game for Masterton's family, went so far as to
15 suggest that the death was just one of those things.

16 "It was a routine accident that could have happened in any hockey game...a
17 normal hazard of the occupation," Campbell said in defense of NHL policy.
18 "(Helmets) are optional now, and we think that is the best method of dealing
19 with it."

20 * * *

21 Callous as it sounded, Campbell's attitude on helmets was merely reflective
22 of a firmly held belief among league owners that their use was bad for the
23 game.

24 85. In 1977, Dave Farrish of the New York Rangers hooked Rick Martin of the
25 Buffalo Sabres around the neck from behind and kicked Martin's feet out from under
26 him. Martin hit his head on the ice, was knocked unconscious, and went into convulsions.
27 A 1978 news article about the incident comments that Martin's head trauma could have
28

1 been mitigated had Martin been wearing a helmet, but quotes then NHL president Zeigler
2 with a countervailing remark, ““The league’s position has been and is right now that the
3 wearing of a helmet is up to the individual.””

4 86. Around the same time, a *Sports Illustrated* article ran a cover story with an
5 image of two hockey players wrestling on the ice, with title stating “A Violent Sport
6 Turns Vicious.” The article went to describe the “severely injured players, court cases
7 and the demeaning of [the] entire sport” caused by the NHL’s “encouragement of
8 brawling.” Then-NHL President Clarence Campbell dismissed those concerns as
9 “pacifist-minded do-gooders” who were “slander[ing] the NHL.”

10 87. In 1996, a Canadian media outlet ran an article titled *Comfort, safety clash*
11 *in NHL helmet debate*, noting a “rash of concussions this season.” That same year, a
12 Canadian media outlet ran an article titled *Concussions just a fact of hockey life*.

13 88. In 1997, Dennis Vaske of the New York Islanders retired due to the effects
14 of three concussions. The first concussion he suffered was in the 1995-1996 NHL season,
15 when he was hit from behind by Eric Lacroix of the Los Angeles Kings. After that
16 incident, Vaske recounted, “[r]iding in that ambulance, I thought my head was going to
17 explode.”

18 89. Nick Kypreos played in the NHL from 1989 until 1997, garnering 81
19 documented fights and winning the Stanley Cup. On one occasion, Kypreos recalled
20 suffering a concussion during a game and, instead of going to the hospital, he participated
21 in a subsequent practice. There was “no protocol to follow” for NHL players who
22 suffered concussions.

23 90. In recounting a fight during a 1997-1998 pre-season game with Ryan
24 VandenBussche which gave Kypreos a career-ending concussion, Kypreos stated:

25 I lost my helmet and hit my head on the ice.... It’s like a dream you can’t
26 remember. Within one hour everything started to come back into focus. I
27 was being asked how I was feeling and if I could go back on the ice to finish
28 the game.

1 91. Pat LaFontaine played in the NHL from 1983 until 1998, suffering from six
2 documented concussions. In 1990, LaFontaine was knocked unconscious by a hit from
3 an opposing player, James Patrick. In 1996, LaFontaine was again knocked unconscious
4 by a hard hit to the head, this time from opposing player Francois Leroux. In 1998, he
5 collided with a teammate and sustained a career-ending concussion. LaFontaine
6 recounted his head trauma:

7 A neurologist at the Mayo Clinic asked me, “Did it feel like someone came
8 along and ripped all the motivation and personality out of you?” That was
9 exactly what happened to me...I remember being scared because for the first
10 month after my fifth concussion, I was very depressed at times. I wouldn't
11 want to come out of my room. My wife was really scared because the littlest
things would set me off.

12 92. During this era, countless other NHL players were suffering life-threatening,
13 career-ending concussions. For example, Dean Chynoweth played in the NHL from 1988
14 until 1998. Chynoweth reportedly suffered 13 concussions during his ten-year career,
15 and was forced to retire at the age of 28 due to concussion-related health concerns.
16 Chynoweth was in a total of 38 fights in his NHL career.

17 93. Gino Odjick played in the NHL from 1990 until 2002. Odjick, a prominent
18 Enforcer, was known as the “Algonquin Assassin” and was in a total of 154 documented
19 fights in NHL games. In the last two years of his career, Odjick sometimes became so
20 forgetful that he could not find the hockey rink, even though “[i]t was just one turn to the
21 right, one turn to the left to get to the rink, but I got lost just going there.” Odjick’s career
22 came to a sudden end when he was hit in the back of the head by a puck. Odjick
23 subsequently suffered from persistent dizziness and headaches and retired from the NHL.
24 Odjick has since struggled with depression and other mental health issues, and has stated
25 that he has spent 32 months in hospitals since his retirement due to his concussions.

26 94. Steve Moore and Mark Moore were brothers who were drafted into the
27 NHL. Mark Moore never played an NHL game due to a minor league concussion he
28 suffered. Steve Moore had played 69 games in the NHL before his career was suddenly

1 cut short in 2004 by opposing player Todd Bertuzzi, who struck Moore from behind and,
2 in the attack, landed on top of him, resulting in a fractured neck and concussion.

3 95. In response to the attack, the NHL suspended Bertuzzi for a mere 20 games.
4 Bertuzzi went on to play in over 1,000 NHL games while Steve Moore's recurring
5 concussion symptoms kept him from ever returning to the NHL.

6 96. Keith Primeau played in the NHL from 1990 until 2006. Primeau suffered
7 four documented concussions in the NHL, where he was in a total of 81 fights. In the
8 2003-2004 season, Primeau missed 21 NHL games due to concussions. In 2006, Primeau
9 suffered a career-ending concussion at the hands of Alex Perezhogin, who hit Primeau in
10 the head. Because of lingering concussion symptoms, Primeau retired from the NHL and
11 has agreed to have his brain donated for use in Boston University's research effort into
12 the causes of CTE in athletes.

13 97. In 2004, before this incident with Primeau, Perezhogin swung his stick at
14 the face of an opposing player in a minor league hockey game. The opposing player was
15 knocked unconscious and started convulsing on the ice. The player required twenty
16 stitches in his face, lost teeth, and suffered a concussion. Perezhogin was criminally
17 prosecuted by the local authorities and was sentenced to one year of probation, though he
18 was still called up to the NHL a year later.

19 98. In 2010, NHL player Marc Savard was carried off the ice after a collision
20 with opposing player Matt Cooke. Savard suffered a Grade 2 concussion from the hit;
21 on-ice officials did not penalize Cooke for the hit. In response to Cooke's collision with
22 Savard and in explaining why Cooke was not suspended, NHL Commissioner Gary
23 Bettman stated: "I was very unhappy and upset with that hit'.... 'I was more upset there
24 was nothing [in the NHL's rules] to do to punish it.'" Cooke's hit on Savard was
25 characterized as "[a]very surgical hit to the head.'" Savard has described the daily
26 struggles with the lasting effects of head injuries: "I'm still hoping that something
27 happens that I'll feel a lot better. But if I feel like this, I still couldn't play."
28

1 99. Paul Kariya, an NHL all-star, ended his NHL career due to the negative
2 effects of head trauma he received. In 1996, an opposing player hit Kariya during an
3 NHL game, concussing Kariya. The player was not penalized during the game, but was
4 subsequently suspended by the NHL. Kariya missed two games because of the
5 concussion. In 2003, Kariya collided with an opposing player during an NHL game,
6 where he laid on the ice motionless and had to be helped to the locker room. Kariya later
7 returned to play in that same game. In one infamous instance, Kariya suffered a blindside
8 hit to the face while celebrating a goal from opposing player Gary Suter, leaving Kariya
9 unable to play for the rest of the season and the 1998 Olympics.

10 100. The NHL suspended Suter for a total of four games. Suter had also been
11 accused of intentionally trying to injure Wayne Gretzky during a Canada Cup game
12 where he slammed Gretzky into the boards, eliminating him from the Championship
13 Round. The NHL inducted Suter into its “Hall of Fame” in 2011.

14 101. Kariya has suffered from headaches and short-term memory loss as a result
15 of his repeated head trauma. Since retirement, Kariya has been an outspoken critic of the
16 NHL, stating in interviews:

17 The thing that I worry about is that you’ll get a guy who is playing with a
18 concussion, and he gets hit, and he dies at centre ice There’s too much
19 of a lack of respect players have for one another If the league wants to
20 stop that kind of conduct, it will have to punish players Ten-game
21 suspensions . . . and more, have to be brought back to help wake up players.
22 There probably isn’t a player in the league who hasn’t had a concussion.

23 102. Eric and Brett Lindros were brothers who played in the NHL. Eric Lindros
24 was the NHL MVP in 1995 and a 2002 Olympic gold medal winner. Eric Lindros also
25 suffered eight concussions from 1998 through 2005, which eventually led to his
26 retirement in 2007. Eric Lindros’s former team, the Philadelphia Flyers, downplayed the
27 seriousness of his concussion condition and questioned whether he took too long to
28 rehabilitate from the concussions.

1 103. Brett Lindros retired two years after playing in the NHL at the age of 20.
2 Brett Lindros had sustained numerous concussions by the age of 20 and is quoted as
3 stating:

4 What was scary for me was each time it took longer to resolve—my last
5 concussion before my 20th birthday took eight or nine weeks.... Sometimes
6 I had memory loss on the bench.

7 104. The news source also interviewed coaches and management from Brett
8 Lindros's team, the New York Islanders, which noted the frequency of concussions and
9 the NHL's willful disregard of the problem. For instance, Mike Milbury, the team's then
10 general manager and coach, stated: "And I think not only do we have to think how to
11 treat a concussion, you have to think more in terms of preventive measures. It used to be
12 in old-time hockey you'd take a hit, you'd get your bell rung and you'd go right back out
13 there. Obviously, we've got to rethink that."

14 105. After retirement, Eric Lindros was also vocal about his views on the
15 concussion problems. In fact, Eric Lindros started a call to action in the ice hockey
16 community through his association with the Ontario Brain Injury Association. A
17 Canadian news source quoted Eric Lindros as stating as follows:

18 It's time to understand that we have a problem We just don't want
19 anyone to go through this again You cannot fix a brain, that's something
20 I had to learn. It's not like a shoulder or a knee Hockey is an old sport.
21 It's the old-school boys and an old way of thinking. We have to change that
22 thinking a little bit. I bought into it, I wanted to be a tough guy. But it didn't
23 do me any good. That's what came home to me obviously . . . my brother
24 can't play hockey anymore Hopefully, other kids won't have to go
25 through this frustration and a shortened dream of playing in the league
26 The lack of response from the hockey community has frustrated me.

27 106. Another Canadian news article discussed the outreach on the NHL's
28 concussion problem by the Lindros family, noting how different the NHL's stance on
concussions is from other elite ice hockey organizations in the world: "In European
hockey, historically, if a player has a concussion, he's automatically out three weeks.

1 That seems bizarre to North Americans.” The Lindros family criticized the NHL’s stance
 2 on concussions, including their “baseline testing:”

3 But you can return to baseline and still be concussed Not all teams rest
 4 players for the same period of time as it’s taken them to lose the symptoms
 5 of concussion. Some teams are knowledgeable, others ignore them
 [symptoms] as if they just didn’t happen.

6
 7 **III. THE NHL IGNORED THE CONSEQUENCES OF HEAD HITS AND**
 8 **CONCUSSIONS AND FAILED TO INSTITUTE ADEQUATE SAFETY**
 9 **MEASURES DESPITE ITS OBLIGATION TO PROTECT PLAYERS.**

10 **A. The NHL Voluntarily Undertook a Duty of Care to Protect and Educate**
 11 **NHL Players about Head Injuries and Player Safety.**

12 107. The NHL, at all relevant times, has maintained strict control over the rules
 13 and structure of NHL games and had authority to enact changes to promote player safety
 14 and educate players.

15 108. The NHL has, and is the only entity with, the authority to govern and manage
 16 player safety. The NHL uses a highly centralized operation requiring its member clubs
 17 to strictly follow the leadership of the NHL’s chief executive and the NHL Board of
 18 Governors.

19 109. The NHL’s Board of Governors regulates the operation of the League,
 20 including the appointment of the Commissioner, rules changes, player equipment, and
 21 player health and safety decisions. Through strict regulation, the NHL sought to ensure
 22 each NHL game was structurally the same.

23 110. Likewise, the NHL has always possessed and exercised unilateral power of
 24 the NHL’s playing rules, equipment standards, medical standards, and player education.
 25 The NHL therefore, has substantial control over the factors influencing player safety.

26 111. With its authority and control over aspects of the game directly relating to
 27 player safety, the NHL has also expressed to players that they can rely on the NHL to
 28

1 ensure they are adequately protected. For example, a draft of the NHL's 1989 mission
2 statement acknowledge the NHL's duty of care for the health and safety of its players:

3 The NHL Mission . . . is to promote the health of NHL players and to prevent
4 injury which can be disabling or threatening to the livelihood of the players
5 and their personal well-being . . . This Mission statement articulates a
6 commitment by the [NHL] to player health and prevention of injury as
critical to safety in the NHL work place.

7 112. Commissioner Bettman confirmed the NHL's duty when he called head
8 injuries a "major concern" and emphasized that the league is "studying [concussions]"
9 and "working hard . . . to make sure we know everything possible to try to protect
10 players."

11 113. Deputy Commissioner Bill Daly echoed Bettman's comments: "You have
12 to do what is right [concerning concussions]. Obviously, we feel there is an obligation
13 on the part of the league office to make sure the game is as safe as it can be."

14 114. Daly has also publicly stated, "[The NHL is] completely satisfied with the
15 responsible manner in which the league and the players' association have managed player
16 safety over time, including with respect to head injuries and concussions This is
17 something that we have always treated as important and will continue to treat as
18 important."

19 115. David Poile, general manager of the Nashville Predators, has commented,
20 "It's the game of hockey, it's going to be physical. As the caretakers we're going to do
21 everything possible to make it as safe as possible, but there are still going to be injuries."

22 116. NHL Executive Vice President Colin Campbell said "[concussions are]
23 something that we're concerned about, always have been concerned about." Campbell
24 also emphasized that "[t]aking steps to maintain the safest on-ice environment possible
25 for the Players remains our most important priority."

26 117. The NHL's public representations underscore its responsibility and duty to
27 enact measures to promote player safety. NHL players in turn reasonably relied on the
28

1 NHL's representations that they would be adequately protected while playing in the NHL
2 and receive proper medical attention when injured.

3 118. Dr. Karen Johnston, director of the Concussion Clinic at Toronto
4 Rehabilitation Institute, has "treated a number of NHL players with concussions" and
5 stated that "[n]o matter what the numbers [of] concussions are in the newspaper, they're
6 much larger than what's reported....Concussions are vastly underreported." Only the
7 NHL has access to the "unreported" or "underreported" head injuries.

8 119. Because the NHL has access to information about player injuries, including
9 information directly from the team doctors, trainers, and other medical personnel, the
10 NHL should fully understand the significance and prevalence of concussions and head
11 hits in its league. Moreover, by undertaking the duty to promote and protect player safety,
12 the NHL had an obligation to understand the medicine and science at stake, and through
13 team and league doctors and experts, had full opportunity to make itself knowledgeable.
14 Unlike the NHL, players do not have access to and could not have fully understood
15 concussions or their consequences.

16 120. In fact, former NHL players, including Wayne Gretzky, one of the greatest
17 NHL players of all-time, indicated that players knew little about concussions and their
18 consequences: "We probably didn't know what a concussion was back in those days . . .
19 It was more a case of 'take two aspirins and come back in the morning. If you had a
20 headache, maybe you practiced, maybe you didn't practice.'" Likewise, teams and team
21 doctors labeled concussion "dings" or "bell-rings" rather than a concussion; but, as was
22 known by the medical community and should have been known by the NHL, "dings" and
23 bell-rings" are concussions.

24 121. Pursuant to the duty of care it undertook and illustrating its authority, the
25 NHL has taken steps to ostensibly protect health and safety. For example, the NHL
26 permitted the discretionary use of helmets for protection. Later, the NHL required their
27 use by most players, but still grandfathered in helmet use such that helmets were not worn
28 by some players as late as the 1996/1997 season.

1 122. Additionally, in 1997, the NHL instituted a so-called “Concussion
2 Program,” which, despite the NHL’s lip-service to preventing concussions, failed to even
3 end the pervasive practice of putting concussed players back in the same game they were
4 injured or to meaningfully limit the number of concussions occurring in the NHL. The
5 egregiousness of the NHL’s careless attitude towards player safety with regard to head
6 hits is made clear by the fact medical professionals had been warning against allowing a
7 concussed player to return to play in the same game in the 1950s; but, a half a century
8 later, the NHL still allowed their players to do so regularly.

9 123. In 2010, more than a decade after its Concussion Program supposedly
10 commenced, the league enacted Rule 48, which prevented hits targeting the head. In
11 2013, the Rule was modified to penalize players who purposefully hit the head where
12 contact with the head was avoidable.

13 124. Under Rule 48, and all previous iterations of the playing rules, the NHL
14 retained exclusive authority to penalize players through suspensions and fines. By
15 suspending (often for far too short a time) and fining players who unnecessarily and
16 severely impact players heads causing substantial injury, the NHL signaled to players
17 that it protected their interests and would ensure their safety in the game.

18 125. Finally, the NHL also has the authority to standardize the arena and playing
19 environments. For example, the NHL required arenas to transition from glass boards to
20 flexible glass systems and issued memoranda to NHL teams advising them of stricter
21 enforcement of rules to protect players’ heads.

22 126. Unlike the NHL’s vast knowledge and control over NHL gameplay and
23 player safety, players had little to no access to information about player safety, the
24 numbers of concussion, or measures that could be enacted to enhance player safety. The
25 NHL knew, and has always known, that players lacked the injury data that the NHL
26 receives from every team after every game, and is therefore, entirely reliant on the NHL
27 to enact appropriate safety measures. The players were left to reasonably rely on the
28 NHL to institute measures necessary for protecting players from harm.

1 127. Any knowledge regarding the long-term neurological effects of repeated
2 blows to the head was undermined by the NHL's continued denials, to this day, that there
3 is any such provable danger.

4 128. Enforcers in particular were left to rely on the NHL's conclusions that
5 fighting in NHL games was acceptable and reasonably safe. Numerous Enforcers
6 reported they were told or at least understood that they would have no place on their team
7 or in the NHL without fighting. Jordin Tootoo, a former Enforcer, said, "I think most
8 fighters don't love doing their job, but ultimately, if that that's going to keep them in the
9 league, that's what they're going to do." Brantt Myhres, a former NHL player, said, "if
10 [I'm] playing pond hockey, 6 or 7 years old, and someone said . . . the only way you're
11 going to make it to the NHL is fighting your way there, you think I would have done it?
12 No way. I would have done something else."

13 129. By making their continued employment in the NHL contingent on their
14 willingness to fight, the NHL signaled that fighting and violence in the NHL were
15 acceptable and appropriate, and that the NHL had determined it to be sufficiently safe to
16 include in its game (despite its absence in other leagues).

17 130. Due to the skill, speed, courage, and dedication of the NHL players, the NHL
18 is financially capable of obtaining and providing full and accurate information about the
19 risks of head trauma to the players. The NHL generates billions in revenue each year and
20 oversees America's most popular hockey league, acting as a trade association for the
21 benefit of the 30 independently-operated teams. The NHL's average attendance per game
22 in 2012-2013 was 17,446, or, over the course of a 41 games, a total of 22 million
23 attendants. The NHL's total league revenue from the 2016-2017 was reportedly \$4.43
24 billion.

25 131. Given its substantial resources, the NHL has far greater ability than
26 individual players, to collect and analyze concussion and head injury science and data,
27 including the cause, effect, type, severity, location, and other specific factors, and to
28 promote effective safety and treatment measures.

B. Despite its Duty to Protect Players, the NHL Promoted and Fostered Violence and Fighting in NHL Games.

132. From the time of its formation in 1917, the NHL quickly found its roots in brutality and violence among its players. For example, in 1923, Sprague Cleghorn of the notoriously violent Montreal Canadiens, used his hockey stick to strike Ottawa Senators player Lionel Hitchman over the head. Cleghorn was criminally charged and found guilty of assault for his misconduct during the game.

133. In 1927, Boston Bruins player Billy Coutu instigated a bench-clearing brawl during the Stanley Cup finals. Coutu punched referee Jerry LaFlamme, and attacked referee Billy Bell. The NHL banned Coutu for life after the incident (lifting the ban only five years later) and fined him \$100.

134. On November 23, 1929, after an on-ice fight between Boston Bruins' Eddie Shore and Montreal Maroons' Dave Trottier, the Maroons spent the rest of the night trying to get even with Shore. By the end of the night, Shore was in the hospital receiving treatment for a broken nose, four lost teeth, two black eyes, a gashed cheekbone, cuts over both eyes, and a concussion. The fighting was so bad that the game had to be stopped in the third period to clean up the blood on the ice.

135. In 1955, Boston Bruins player Hal Laycoe hit Montreal Canadiens player Maurice Richard over the head (at that time, players were not required to wear helmets) with his hockey stick, resulting in his bleeding profusely on the ice. In retaliation, Richard struck Laycoe on the shoulder with his stick, punched another Bruins player in the face, and punched a referee. The Boston police attempted to arrest Richard in the locker room, but were supposedly kept away by Richard's teammates.

136. As the NHL continued to thrive in subsequent eras, so did routine and brutal violence. This continued growth can be best exemplified through the "Enforcers" or "Goonies" of the 1970s, 1980s, and 1990s—players known for using intimidating force to protect marquee teammates and respond aggressively to physical or foul play. Oftentimes, these players were put and kept on NHL teams precisely for their physicality,

1 not their pure hockey skills. And even skill players, who had never had a single fight in
 2 their high school, college, or minor league hockey careers, were forced to become
 3 “Goons” or “Enforcers” in order to keep their jobs.

4 137. One of the most infamous examples of NHL “goons” were the Philadelphia
 5 Flyers’ “Broad Street Bullies.” The Flyers franchise formed in 1967, and just a few years
 6 later gained a reputation for their brutal violence on the ice. Their violent style of play
 7 led to increased fan attendance, and other franchisees sometimes saw their home
 8 attendance double when their teams played the Flyers. Bobby Clarke, a player for the
 9 Flyers, reflected fondly of the Broad Street Bullies in 2014, saying, “We took a lot of
 10 pride in the way we played the game. Not only were we winning, we were playing the
 11 game properly and fighting was part of the personality of the team. There are a lot of
 12 teams in the league who had as many tough guys as we did, but our reputation became so
 13 big that it was intimidating to other teams.” Ed Snider, then owner of the Flyers,
 14 remembered concerns about the Flyers intimidating style of play, noting that the front
 15 office could do nothing because they set the rules allowing fights and violence: “[T]he
 16 point is that those rules, who set them? Who said fighting was allowed in hockey?
 17 We didn’t break any rules. We just enhanced them.”⁶

18 138. As the violence in the NHL continued, outside observers grew concerned
 19 about the vicious acts promoted and glorified by the NHL. In 1974, the Ontario Cabinet
 20 appointed Canadian lawyer William McMurtry to issue a report on violence in hockey
 21 (“McMurtry Report”). As part of his research, McMurtry interviewed numerous NHL
 22 players. His official report was stark and concluded:

23 In talking to numerous players in the NHL and WHA, they all feel that most
 24 advertising and selling of the game is over-emphasizing the fighting and
 25 brawling at the expense of educating the crowds about the skill and finesse.
 26 This past season the advertising for the NBC Game of the Week showed a

27 ⁶ Adam Proteau, *An Oral History of the Broad Street Bully-Era Philadelphia Flyers*, The Hockey
 28 News (Nov. 10, 2014), <https://thehockeynews.com/news/article/an-oral-history-of-the-broad-street-bully-era-philadelphia-flyers>

1 film clip of a hockey fight. Can you conceive of any other sport promoting
2 itself in this fashion?

3 139. In 1975, Bobby Hull, considered among the greatest NHL players of all
4 time, staged a one-game strike in protest of the NHL's commoditization of violence,
5 stating "[t]he game is no pleasure any more. It's an ordeal." Hull further stated:

6 It's time we took some action...because, if something isn't done soon, it will
7 ruin the game for all of us. I've never seen so much stuff like this. I never
8 thought it could be so bad It's becoming a disaster The idiot
9 owners, the incompetent coaches, the inept players are dragging the game
into the mud. They're destroying it with their senseless violence . . .

10 140. On February 17, 1986, *Sports Illustrated* published an article entitled,
11 *Hockey? Call It Sockey: Hockey's designated hit men are making a travesty of the game.*
12 *It's high time to get rid of all the goons*, where it firmly criticized the NHL's failure to
13 take action against violence, stating:

14 [M]any NHL executives are scared to death that if fighting were banned
15 from hockey, thousands of season-ticket holders who get their jollies from
16 watching grown men in short pants in a quasi-legal, bare-knuckle battle
17 would bail out on the spot. Violence sells. That's not news, so does sex. If
18 that's what's important, why doesn't the league hire a bunch of bikini clad
19 bimbos to skate around behind the Zambonis holding up placards showing
each team's penalty totals?

20 141. Moreover, law enforcement authorities began to criminally charge NHL
21 players for their on-ice conduct, even while the NHL remained silent.

22 142. In 1988, Minnesota North Stars player Dino Ciccarelli was criminally
23 prosecuted when, during a game against the Toronto Maple Leafs, Ciccarelli attacked
24 Maple Leafs player Luke Richardson with his stick. Ciccarelli was subsequently
25 sentenced to one day in jail and fined \$1,000.

26 143. In 2000, Canadian authorities charged and convicted NHL player Marty
27 McSorley of assault with a weapon, after he attacked opposing Vancouver Canucks
28 forward Donald Brashear with his stick, with three seconds left in the game. Brashear

1 fell on his head, lost consciousness, and suffered a concussion. McSorley was sentenced
2 to 18 months' probation. The NHL suspended McSorley for a year.

3 144. Vancouver Canucks player Todd Bertuzzi pleaded guilty to assault charges
4 following the March 8, 2004, incident, described above, in which he threw a right hook
5 to the back of Colorado Avalanche player Steve Moore, after Moore supposedly refused
6 to turn and face him. In September of 2014, after ten years of litigation during which
7 Bertuzzi claimed that the Canucks coach told players during the second intermission of
8 the game that Moore needed to "pay the price" for his hit against another Canucks player
9 five days earlier, it was announced that Bertuzzi and Moore had reached a private
10 settlement regarding the matter.

11 145. In 2011, Mario Lemieux, then owner of the Pittsburgh Penguins and one of
12 the most respected hockey players of all time, spoke out against the growing violence in
13 the NHL. Specifically, in response to the NHL's failure to discipline players following
14 a fight-filled game between the Pittsburgh Penguins and New York Islanders, Lemieux
15 posted the following in a letter on the Pittsburgh Penguins' website:

16 Hockey is a tough, physical game, and it always should be. But what
17 happened Friday night on Long Island wasn't hockey. It was a travesty. It
18 was painful to watch the game I love turn into a sideshow like that. The
19 NHL had a chance to send a clear and strong message that those kinds of
20 actions are unacceptable and embarrassing to the sport. It failed. We, as a
21 league, must do a better job of protecting the integrity of the game and the
22 safety of our players. We must make it clear that those kinds of actions will
23 not be tolerated and will be met with meaningful disciplinary action. If the
24 events relating to Friday night reflect the state of the league, I need to re-
25 think whether I want to be a part of it."

26 146. On February 21, 2011, in an article entitled *Fighting Hockey Violence A*
27 *Losing Battle*, discussing Lemieux's remarks, the *National Post* stated:

28 Violence in hockey persists for one simple reason: Today, as in 1975, the
men who control the game have no interest in eliminating it. Forget all the
familiar rationalizations and explanations. Any reasonable analysis would
conclude that players should not be policed by other players, that the threat

1 of retaliation should not be used to enforce good behavior, that infractions
2 of the rules should not be used to market a sport.

3 147. Each era of the NHL is marked by egregious acts of violence and
4 fighting, and the NHL's culture of violence contributed to repeated and numerous
5 head injuries.

6 **C. The NHL Promoted Violence In Its League To Increased Its Profits.**

7 148. The NHL has expressly and regularly acknowledged that it has capitalized
8 on extreme violence, including fighting.

9 149. In 1974, then NHL President Clarence Campbell acknowledge the NHL's
10 business objective was to increase viewership through whatever means necessary:

11 [I]t is the business of conducting the sport in a manner that will induce or be
12 conducive to the support of it at the box office Show business, we are
13 in the entertainment business and that can never be ignored. We must put
14 on a spectacle that will attract people.

15 150. According to William McMurtry's 1974 report on fighting in the NHL,
16 McMurtry and Campbell discussed the pressure facing players to fight:

17 **McMurtry:** And right now it is extremely difficult for the player who is
18 being provoked and being pushed to turn his back and appear to be
19 running....

20 * * *

21 **McMurtry:** To have the sanction there of being embarrassed and ridiculed
22 and to be discussed among your peers and your coach and many millions of
23 fans, that is not one of the most difficult decisions in the world for a person,
24 to turn his back and not fight?

25 **Campbell:** I didn't say it wasn't difficult. I said it is an alternative.

26 **McMurtry:** Then if you will agree it is a very difficult alternative, it is
27 apparently what you call the free alternative.

28 **Campbell:** All right.

1 **McMurtry:** There is incredible pressure and duress on that player not to
2 turn his back—is that not true?

3 **Campbell:** I don't think it is as great as you say, but it is real.

4 **McMurtry:** There is a real pressure and duress on that player to stand his
5 ground and to fight?

6 **Campbell:** I think so, yes, yes.

7
8 151. In 1988, *The Miami Herald* quoted then-NHL President John Ziegler as
9 stating, "Violence will always be with us in hockey.... Anytime you get a situation of
10 high anxiety and frustration in any walk of life, you get violence."

11 152. In a 1989 interview with *The Wall Street Journal*, Ziegler went on to explain
12 why he would not put an end to fighting in the NHL:

13 If you did that, you wouldn't be commissioner for long.... The view of the
14 21 people who own the teams, and employ me, is that fighting is an
15 acceptable outlet for the emotions that build up during play. Until they agree
16 otherwise, it's here to stay.... The main question about fighting is, "Does
the customer accept it?" The answer, at present, seems to be yes.

17 153. In a 2007 press conference, current NHL Commissioner Gary Bettman
18 explained that "[W]e're not looking to have a debate on whether fighting is good or bad
19 or should be part of the game." and continued "[f]ighting has always had a role in the
20 game"

21 154. In 2011, Bettman highlighted fan support as a reason why fighting and other
22 extreme violence persists in NHL hockey: "Our fans tell us that they like the level of
23 physicality in our game, and for some people it's an issue but it's not as big an issue in
24 terms of fans and people in the game to the extent that other people suggest it is."

25 155. In 2013, Bettman called fighting in NHL hockey a "thermostat" that helps
26 cool things down when tensions run high.

27 156. In August 2013, 66% of the delegates at the Canadian Medical Association's
28 annual meeting voted to "condemn the complacency" of the NHL in regards to violence

1 in hockey. CMA president and injury-prevention expert Louis Francescutti commented:
2 “What we want to do is make it crystal clear that violence must be addressed...purposely
3 hurting someone is not part of the game of hockey.”

4 157. The NHL regularly continues to feature violent hits and fights in
5 commercials for the game, and other advertising, and features such violence prominently
6 on its website. For example, in 2012, the NHL gave “feature billing on the league’s
7 website” to a video of an infamous brawl in Madison Square Garden involving six
8 experienced fighters fighting at once. According to an article from the *Canadian Press*,
9 the NHL gave “no fines or suspensions” to those involved.

10 158. The NHL promotes the HBO Documentary, *Broad Street Bullies*, on its
11 Philadelphia Flyers affiliated website. The trailer for the film, viewable on
12 www.flyers.nhl.com, features clip after clip of fighting and violent head shots,
13 accompanied by voice-over testimonials extolling the virtues of winning through
14 “intimidation” over talent.

15 159. The NHL’s philosophy regarding brutality and violence is also exemplified
16 by NHL Original Products—an agent and instrumentality of the NHL devoted to
17 producing promotional films for the NHL. NHL Original Products has created numerous
18 features that focus on the hardest hits that take place on the ice, further advancing the
19 NHL’s culture of violence as entertainment.

20 160. A simple search of either “hits” or “fights” on www.nhlfilmsarchive.com
21 reveals numerous highlights and compilations of the violent hits and fights that have
22 taken place in the NHL over the years. Whether affiliated with the NHL or not,
23 nhlfilmsarchive.com exists, and the NHL allows its intellectual property to be used and
24 its violent footage to be featured.

25 161. In addition, if a person were to visit www.nhl.com during the regular season,
26 they would see Enforcers and fisticuffs in the main news story rotation on a nightly basis.

27 162. The NHL Network produces a weekly program segment called “Top 10 Hits
28 of the Week.” Those clips are archived for viewing on the nhl.com website.

1 163. Individual teams also show in-game replays of violent hits, with the marquee
2 “Hit of the Game” above the jumbo television screens.

3 164. NHL Films, an agent and instrumentality of the NHL devoted to producing
4 promotional films, has created numerous highlight features that focus solely on the
5 hardest hits that take place on the ice. These featured videos are marketed and sold to
6 advance the NHL’s culture of violence as entertainment.

7 165. In addition, NHL-sponsored video games include fighting and vicious body
8 checking. Video game players can even add virtual Enforcers to their team rosters. For
9 example, the NHL licensed EA Sports to produce *NHL 14*, released on September 10,
10 2013, and which featured a completely revamped fighting system called the “Enforcer
11 Engine.” Those new features included: (a) Enforcers coming to the aid of downed
12 superstars and initiating fights; (b) “physics-based punch targeting” that make blows
13 more realistic; and (c) real-time facial damage such that bruising and black eyes remain
14 throughout the game.

15 166. *NHL 14* producer Sean Ramjagsingh told the *Canadian Press* in an
16 interview: “it was all about capturing the big hits, real fights and unbelievable speed and
17 skill of hockey.” Ramjagsingh said: “When I look back at *NHL 13*, I feel like we fell
18 short a little bit on the aggression piece of it.” As of the 2019 version, EA Sports’s NHL
19 licensed video game still features fighting, with in-game boosts in energy awarded to the
20 team who’s player prevails in the fight.

21 167. In 2014, the NHL’s view on violence in hockey took center stage during the
22 U.S. House of Representatives Committee on Energy and Commerce on concussions in
23 sports. During a hearing on March 13, 2014, NHL Deputy Commissioner Daly testified
24 that “fighting remains a small part of our game,” stating:

25 [O]ur fans—who continue to attend our games in new record numbers
26 almost every year (at least 20 million in attendance in every full season since
27 the turn of the century)—want [the game] to be physical.

28 168. According to Deputy Commissioner Daly:

1 The role of fighting continues to be a hot topic in our game and one which
2 engenders a broad spectrum of opinions and debate. As a League, we
3 continue to search for a consensus as to how best to serve the interests of all
4 constituent groups in the game on the issue—including our fans, our teams,
5 and our Players. To this point, that consensus has proved elusive, including
6 with and as among our Players.

7 169. For nearly a century, the NHL failed to provide its players with full, accurate
8 information about the risks of head trauma because it has profited handsomely from the
9 culture of violence it created, notwithstanding the long term effects of brain injuries.
10 Through its savvy media outlets, the NHL is able to promote the most violent aspects of
11 the game and urge players at every level to remain uninformed about the true risks of
12 violent head impacts. The NHL has created a culture in which the “toughest” players are
13 glorified for their ability to dish out and endure severe violence on the ice, while denying
14 that blows to the head have any provable long term consequences.

15 170. Within this culture, the NHL profits from the brutality and violence it
16 promotes but players are harmed. This attitude has existed for decades and continues to
17 the present day, with players lauded for their body checking, fighting skills, and
18 toughness, encouraging them to play through injuries, including concussions while
19 describing any long term neurological effects as unproven and the result of media and
20 lawyer hype.

21 **D. The NHL Downplayed the Risks of Head Trauma and Continues to**
22 **Deny the Potential Long Term Neurological Effects, Failing to Fully and**
23 **Adequately Inform NHL Players.**

24 171. The NHL has known, or should have known, for decades that head hits and
25 concussions lead to long-term brain injury, including but not limited to memory loss,
26 dementia, depression, CTE, and related symptoms. Rather than take immediate measures
27 to protect its players, the NHL failed to disclose relevant and highly material health
28 information regarding the significant risks associated with repeated head hits, concussive

1 or subconcussive. At the same time, the NHL promoted and encouraged violent blows
2 to the head, including bare-knuckled fist-fighting, as a routine part of the game.

3 172. At all relevant times, the NHL's unique historical vantage point at the apex
4 of the sport of hockey, paired with its unmatched resources as the most well-funded
5 organization devoted to the business of the game, has afforded it unparalleled access to
6 science and data relating to the effect of head impacts on its players and made it an
7 institutional repository of accumulated knowledge about head injuries to players.
8 Furthermore, the NHL has trumpeted its role in educating players on these issues and
9 taking care of their safety.

10 173. However, the NHL has made, and continues to make, many statements
11 downplaying the risks of head trauma and fighting, and denying the need for reform to
12 decrease those risks.

13 174. For example, in response to proposed legislation in 1980 to curb violence in
14 professional sports (The Sports Violence Act of 1980), then NHL President Ziegler
15 was quoted by a Canadian media outlet as stating at a subcommittee hearing that "under
16 the present laws in the United States and in the provinces of Canada, people charged with
17 refereeing the sports seem to have done a responsible job." Ziegler was also quoted as
18 stating that the NHL "didn't need the federal government to interfere."

19 175. And in a 2007 press conference, Commissioner Bettman acknowledged the
20 topic of fighting is "something we need to look at," but that "[f]ighting has always had a
21 role in the game" and "we're not looking to have a debate on whether fighting is good or
22 bad or should be part of the game." The comments were in response to a series of fighting
23 incidents, including one on March 21, 2007, when Colton Orr of the New York Rangers
24 fought with Todd Fedoruk of the Philadelphia Flyers and ended up knocking Fedoruk
25 unconscious.

26 176. In 2011, Commissioner Bettman said of fighting: "Maybe it is [dangerous]
27 and maybe it's not. You don't know that for a fact and it's something we continue to
28 monitor." Bettman said it is premature to draw a connection between fighting in hockey

1 and CTE. The remarks were made in response to questions about the deaths of three
 2 former NHL players in 2011 who were prominent fighters, and a *New York Times* article
 3 discussing the link between fighting and CTE. Bettman said he thought “in this whole
 4 area there is probably entirely too much speculation and rumors.” Bettman defended the
 5 inclusion of fighting in hockey for profit’s sake, saying “[o]ur fans tell us that they like
 6 the level of physicality in our game.” He further explained “people need to take a deep
 7 breath and not overreact” and not “over-conclude when the data isn’t there yet.”

8 177. The NHL has persistently communicated to its players that they were not at
 9 risk of long-term brain and neurocognitive injury from concussions and other head
 10 injuries. These include, for example:

- 11 (a) promoting fighting, especially staged fights, of the sort engaged in by Derek
 12 Boogaard, Wade Belak, Rick Rypien, Bob Probert and Todd Ewen—all now
 13 dead, all of whom had degenerative brain diseases;
- 14 (b) having players continue their careers even after deliberately inflicting
 15 career-ending brain injuries to competitors, such as the one Vancouver’s
 16 Todd Bertuzzi did to Colorado’s Steve Moore on March 8, 2004;
- 17 (c) calibrating player discipline for head hits to the existence and severity of
 18 resulting injury, as the NHL’s former Vice President for Player Safety,
 19 Brendan Shanahan admitted doing;
- 20 (d) returning players to play in games in which they had been concussed, even
 21 knocked cold, as Gilles Gratton did in a game against the Boston Bruins in
 22 1976-1977;
- 23 (e) returning players to play after concussive and other head injuries without
 24 any medical evaluation or subsequent waiting period, despite the medical
 25 consensus that concussed players should not return to play and even after
 26 the NHL created its concussion research program in 1997;
- 27 (f) by never warning the players that they might be developing CTE and should
 28 be checked for symptoms to ensure that they understood that continued

1 playing might expose them to irreversible brain damage and neurocognitive
2 impairment;

3 (g) by never warning the players that studies of football players and boxers, and
4 others of the sort described herein, were applicable to NHL players;

5 (h) by avoiding any proper study of concussions and other head injuries and
6 developing rules and protocols for disclosing risks and minimizing their
7 occurrence; and

8 (i) By deliberately negating any warning or other knowledge NHL players
9 might have otherwise received through constant denial of and statements
10 contradicting the conclusion that repeated blows to the head could lead to
11 long term neurological sequelae.

12 178. To this day, the NHL, and specifically, Commissioner Bettman, continues
13 to deny the link between neurocognitive disorders and repeated head trauma. On April
14 10, 2018, Bettman (falsely) claimed that Boston University “will tell you that as it relates
15 to hockey, they don’t have enough evidence to reach any conclusions [about the long-
16 term effects of head hits in hockey].” In 2016, Bettman wrote a letter to Connecticut
17 Senator Richard Blumenthal blaming the media and “plaintiffs’ attorneys” for the death
18 of Todd Ewen by inventing the link between head hits and CTE, (falsely) claiming there
19 is “indisputable medical and scientific consensus” that it is not possible to link the
20 development of CTE and head hits. He further stated:

21 The science regarding CTE, including on the asserted ‘link’ to concussions
22 that you reference, remains nascent, particularly with respect to what causes
23 CTE and whether it can be diagnosed by specific clinical symptoms . . . And,
24 as of today, the CTE Center researchers admit that the study of CTE remains
in its ‘infancy.’

25 179. Medical professionals have directly disputed Bettman’s denials. Boston
26 University’s Dr. Ann McKee and the Concussion Legacy Foundation’s Chris Nowinski
27 recollected their 2012 conversation with Bettman:
28

1 CTE was first described in boxers, so it was not a surprise to diagnose CTE
2 in [hockey] fighters. We told Mr. Bettman that with that sample, we could
3 not conclude if the presence of CTE was most likely associated with head
4 impact exposure from normal hockey play or fights. However, we were
5 clear that the evidence supported the conclusion that in those four former
6 NHL players, their CTE was due to the head impacts they received as a
7 hockey player who participated in fights as part of the game.

8 180. Boston University also rejected Bettman's 2018 statements that no
9 "conclusions" have been made about the cause of CTE:

10 [I]t is misleading for Mr. Bettman to say we haven't reached any
11 conclusions. The evidence clearly supports that CTE is associated with ice
12 hockey play. Since that 2012 meeting with Mr. Bettman, the VA-BU-CLF
13 [Veterans Affairs-Boston University-Concussion Legacy Foundation]
14 research team has identified CTE in more ice hockey players, including four
15 amateur hockey players, not all of whom had significant fighting exposure.
16 This provides evidence that normal ice hockey head impact exposure can be
17 associated with CTE.

18 181. The NHL continues to downplay the significance of CTE and its prevalence
19 among former NHL players. Unlike the NFL, which has itself been criticized about the
20 number of head hits in football, the NHL not funded or provided any assistance to the
21 major centers leading research into neurodegenerative disease. Not only does the NHL
22 continue to deny the link between CTE and head hits in hockey, it has no interest in
23 research that may establish such a link, antithetic to the duty it undertook to protect its
24 players.

25 182. The NHL's position on CTE undermines its players' safety by encouraging
26 players, coaches, team personnel, NHL management, and NHL fans to ignore and even
27 accept the head hits and concussions as an inconsequential part of the game.

28 **E. The Extreme Violence in the NHL Is Unnecessary and Absent Among
Other Hockey Leagues and Sports.**

183. The NHL for decades has fostered an unreasonably and unnecessary violent
League full of sheer brutality by, among other things, allowing and promoting bare

1 knuckled fighting and checks to the head. The NHL continues to generate billions in
2 revenue with its violent culture, and its violent dynamic is wholly unique among sports.
3 Other elite and professional ice hockey leagues successfully promote a completely
4 different style of play, including Olympic and European ice hockey, in which finesse,
5 speed, skill, and power without violence dominate, and fighting is nearly nonexistent.

6 184. Other professional hockey and sports leagues have harsh punishments
7 against fighting, resulting in the near extinction of fighting from the game. For example,
8 fighting is prohibited by the International Ice Hockey Federation (“IIHF”), which governs
9 Olympic hockey and most international leagues.

10 185. The National Collegiate Athletic Association (“NCAA”) prohibits “fighting
11 or punching” in U.S. college hockey. Pursuant to Rule 48 of the NCAA Hockey Rules
12 and Interpretations, any player caught fighting is immediately disqualified, removed from
13 the game, and suspended from playing in the next game. The act of instigating results in
14 removal from the game and a two-minute penalty for the team, while continuing a fight
15 results in removal from the game for ten minutes, suspension, or disqualification.

16 186. Likewise, Canadian Interuniversity Sports (“CIS”), governing universities
17 in Canada, penalizes fighting in ice hockey with a game misconduct, resulting in the
18 offending player’s ejection from the game and a suspension for the subsequent game.
19 The second fight means a game misconduct and two-game suspension; and a third fight
20 means a game misconduct, a minimum three-game suspension, and a review by the
21 league. The rules are virtually identical through Canada’s Ontario, Atlantic, and Canada
22 West conferences.

23 187. According to University of Saskatchewan head ice hockey coach, Dave
24 Adolph:

25 Everybody thought it would hurt our game. It has not Our league is a
26 better place without fighting. . . . The day they took fighting out, all us young
27 coaches were totally petrified that—without the guy who could keep
28 someone honest—it would all escalate. It has not There’s a little more
stick work, and a few more pretenders, but we don’t have the concussion

1 problems. No one tries to hurt the skill guys. You almost stand out if you're
2 an idiot at our level.

3 188. There are still more professional sports leagues that also prohibit fighting.
4 The National Basketball Association ("NBA") imposes severe penalties upon players
5 who fist-fight. Any player who fights, punches, *attempts* to punch, or elbows the head
6 of another player is "ejected immediately" and is subject to a fine and/or suspension by
7 the Commissioner. The fine ranges from a minimum of \$1,000 to a maximum of \$35,000
8 for the first offense.

9 189. The NBA further states in its rulebook's "Comments on the Rules" section:
10 Violent acts of any nature on the court will not be tolerated. Players
11 involved in altercations will be ejected, fined, and/or suspended.

12 There is absolutely no justification for fighting in an NBA game. The fact
13 that you may feel provoked by another player is not an acceptable excuse.
14 If a player takes it upon himself to retaliate, he can expect to be subject to
15 appropriate penalties.

16 190. The NFL prohibits all players from striking any other player with fists. Any
17 player who punches another player is immediately ejected from the game and his team is
18 assessed a 15-yard penalty. The NFL has also implemented rules designed to reduce the
19 number of concussion-causing head hits. For example, the NFL changed the location of
20 kick-offs to reduce the speeds at which players are running and to increase the number of
21 "touch-backs," which end the play without any tackling. The NFL also penalizes and
22 fines players who purposefully tackle by hitting an opposing player with their helmet on
23 another player's helmet. In 2018, the NFL expanded its restriction on tackling with the
24 helmet by prohibiting a player from "lower[ing] his head to initiate and make contact
25 with his helmet against the opponent." Violating the rule may lead to a penalty or ejection
26 from the game.

1 191. As opposed to the NHL, where in 2013 there were a remarkable 444 fights
2 involving 282 players in nearly one-third of all NHL games, only a handful of NFL
3 players were involved in fighting that same year.

4 192. By both enforcing their rules and imposing proportional punishments, other
5 sports have successfully curbed violent fights from breaking out in their games, and
6 essentially eliminated all fighting in their sport.

7 193. By promoting and, in fact, glorifying fighting, the NHL continues to
8 perpetuate its message to players, coaches, and fans that blows to the head should not be
9 considered serious injuries.

10 **IV. TODD EWEN DEVELOPED CTE AS A RESULT OF THE HEAD HITS HE**
11 **EXPERIENCED IN THE NHL.**

12 **A. Todd Ewen's Life and NHL Career.**

13 194. Todd Ewen had a prolific hockey career. Born on March 22, 1966, Todd
14 was a star in the Western Hockey League ("WHL"), a Canadian major junior ice hockey
15 league. In 1984, after four years in the WHL and at the age of 18, the Edmonton Oilers
16 drafted Todd 168th overall.

17 195. In 1984 and 1985, Todd had brief stints in the American Hockey League and
18 International Hockey League, two NHL developmental leagues. In 1985, Todd was
19 called up by the Edmonton Oilers for the 1985 Stanley Cup playoffs, but never played.
20 In 1986, the Edmonton Oilers traded Todd to the St. Louis Blues.

21 196. In 1986, Todd began his long and established career in the NHL. Over the
22 course of 11 seasons, Todd played in 518 regular season games and 26 playoff games,
23 including a championship season with the Montreal Canadians in 1992-1993. Todd
24 played for four different teams – the St. Louis Blues, Montreal Canadians, the Anaheim
25 Mighty Ducks, and the San Jose Sharks.

26 197. Despite being a prolific scorer at a young age and despite his speed on the
27 ice (he was often said to be one of the fastest in the NHL) Todd was typecast as an
28 "Enforcer" due to his formidable size at 6'3" and 230 lbs.

1 198. Todd solidified his role as an Enforcer in his first full season in the NHL,
 2 when, on January 24, 1987, Todd fought and knocked out Bob Probert, a feared NHL
 3 fighter known as the “undisputed heavyweight champion of the NHL.”⁷ Immediately
 4 after returning to the ice, Probert went after Todd to a second time. Todd and Probert
 5 fought and Todd took numerous blows to the head during the bout.⁸ Probert would go
 6 after Todd again that season, on March 7, 1987. With a cheering crowd in the
 7 background, Todd took several blows to the head before referees broke up the fight.⁹

8 199. After downing Probert twice, Todd became known as “The Animal” and
 9 was typecast as a fighter for the rest of his career.¹⁰ Jacques Demers, who coached Todd
 10 when he played for the Montreal Canadiens in 1993, recalled that “I never, ever remember
 11 sending one of my players out and say ‘Go fight.’ But I also sent them out when I knew
 12 there was trouble and they knew their job.” Demers said that Todd “knew if he wanted
 13 to stay in the NHL, [fighting] is the only thing that could keep him there. These guys,
 14 they had a thankless job and if they wanted to stay in the NHL they had to fight.”

15 200. Despite his success as an Enforcer, Todd disliked fighting. His teammates
 16 recall that he “hated being a tough guy” but “came upon the role because of his size –
 17

18 _____
 19 ⁷ Probert “was generally considered the undisputed heavyweight champion of the NHL for much of his
 20 career and young guys entering the NHL usually wanted to drop the gloves with Probert, who more
 21 often than not obliged.” Brendan Savage, *Proof that Bob Probert was NHL Heavyweight Fight Champ*,
 Michigan Live (10:56 AM, Aug. 1, 2017),
https://www.mlive.com/redwings/index.ssf/2017/08/the_best_of_bob_proberts_fight.html. Probert
 claims to have fought 246 fights. *Id.*

22 ⁸ The two fights in full are documented on video. See HockeyFights.com, *Todd Ewen vs Bob Probert*
 23 *Rds 1&2 NHL Jan 24/87*, Youtube.com (last visited, July 25, 2018),
https://www.youtube.com/watch?v=HLiJ_fd3K18.

24 ⁹ See HockeyFights, *Bob Probert vs Todd Ewen Mar 7, 1987*, Youtube.com (last visited, Jul. 25, 2018),
 25 <https://www.youtube.com/watch?v=uexej-kRPII>.

26 ¹⁰ Stu Cowan, *Former Hab Todd Ewen was more than just a tough guy*, Montreal Gazette (Sep. 22,
 27 2015), [https://montrealgazette.com/sports/hockey/nhl/montreal-canadiens/stu-cowan-former-hab-todd-ewen-was-](https://montrealgazette.com/sports/hockey/nhl/montreal-canadiens/stu-cowan-former-hab-todd-ewen-was-more-than-just-a-tough-guy)
 28 [more-than-just-a-tough-guy](https://montrealgazette.com/sports/hockey/nhl/montreal-canadiens/stu-cowan-former-hab-todd-ewen-was-more-than-just-a-tough-guy).

1 and that was a high level of stress for him.” “His whole career he hated it.”¹¹ Others
 2 recalled that “Ewen liked being a hockey player more than a tough guy.” “He didn’t
 3 enjoy the role (of Enforcer), but he knew it made him successful and it gave him the
 4 opportunity to put meals on the table. So he did it.”¹² Todd’s teammates remember him
 5 as a talented hockey player outside of fighting.

6 201. Todd’s family agreed, saying that being an Enforcer was “a role that made
 7 him a living, gave him a career, but it certainly wasn’t anything that . . . he wanted to
 8 do.”¹³ Todd fought, not for the money, but for the love the game. In fact, Todd’s family
 9 described him as “soft and caring off the ice.”

10 202. During a 1993 interview, Todd expressed that fighting was not a part of his
 11 character, but of his job:

12 I have to explain to children that there are two parts of me. I am different
 13 things in different situations. I think that’s what people tend to forget. There
 14 are businessmen who have this cutthroat personality at work and then when
 15 they come home, they’re completely different. That’s the way it is with me.
 16 When you come watch me at a hockey game, I’m working. I get paid to do
 17 this.¹⁴

18 203. Throughout his career, Todd amassed nearly 2,000 penalty minutes,
 19 including 146 fighting majors. HockeyFights.com reports that Todd fought in 150 fights
 20 over his 11 year career, an average of almost 14 fights per season. At times, Todd Ewen
 21 fought an average of four fights per month during the regular season. In January 1994,

22 ¹¹ James Mirtle, *Did Hockey Kill Todd Ewen*, The Globe & Mail (Oct. 28, 2015),
 23 <https://www.theglobeandmail.com/sports/hockey/was-todd-ewens-death-caused-by-his-nhlcareer/article26987457/>.

24 ¹² Kevin Allen & Erik Brady, *Todd Ewen’s death spurs more questions about fighting in the NHL*, USA
 25 Today (Sep. 22, 2015), <https://www.usatoday.com/story/sports/nhl/2015/09/22/todd-ewen-death/72652934/>.

26 ¹³ *Family, friends, remember former NHL player Todd Ewen*, CBC News (Oct. 9, 2015),
 27 <https://www.cbc.ca/news/canada/edmonton/family-friends-remember-former-nhl-player-todd-ewen-1.3265937>.

28 ¹⁴ *Supra* note 10.

1 Todd fought in 8 fights in less than 30 days. By comparison, boxers are recommended a
2 30 day medical recovery suspension after a technical knockout and a 45 day medical
3 recovery suspension after a knockouts.

4 204. Todd's time on Anaheim and San Jose proved to be the most taxing on his
5 brain and body. Todd played more games and had more fights for these teams than
6 anywhere else. In San Jose particularly, Todd was pushed to play as aggressively as
7 possible, especially with checks and hits to opponents.

8 205. Todd's most prolific fighting seasons were the 1993-1994 and 1995-1996
9 seasons with the Anaheim Ducks. In both seasons, Todd fought in nearly 30 fights. As
10 one beat writer for the Mighty Ducks wrote: "In the early Mighty Duck days, the team
11 was not known for its finesse or ability to outscore opponents. The Mighty Ducks relied
12 on old time hockey players like Todd Ewen to protect the skill players to give them a
13 chance to compete each night . . . Todd Ewen wasn't a skill player obviously, but he
14 stood up for his teammates every chance he could. He helped protect his fellow players
15 on the Ducks Team . . . and opponents feared fighting him on the ice. He and Mighty
16 Ducks teammate Stu Grimson AKA Grim Reaper were a force to be reckoned with as
17 they would routinely battle anyone on the ice in the early days of Anaheim's hockey
18 franchise."¹⁵

19 206. While the documented and recorded fights demonstrate Todd to have been
20 a prolific fighter, they also exclude the numerous and violent fights that occurred during
21 pre-season training camps. Todd and other Enforcers were pushed to fight against each
22 other during training camps to prove their value and worth to the team. An incumbent
23 enforcer was not guaranteed a position on the team. Some of Todd's most intense and
24 significant fights occurred during those camps because his NHL career depended on
25 winning in camp. Todd strongly disliked training camp fights but felt obligated to
26

27 ¹⁵ Mike Walters, *Original Mighty Duck Todd Ewen Passes Away*, Ducks N Pucks (Sept. 19, 2015),
28 <https://ducksnpucks.wordpress.com/2015/09/19/original-mighty-duck-todd-ewen-passes-away/>.

1 participate to ensure his role on the team. Even when he played for Anaheim and San
2 Jose, Todd's experience in the NHL was not enough to guarantee him a position on the
3 roster. Rather, both teams were interested in his ability to fight and pressured Todd to
4 participate in intense training camp fights and to intimidate, hit, and fight opponents
5 during the season.

6 207. Todd's body and brain suffered the consequences of the fighting forced upon
7 him in his role as an Enforcer. He suffered numerous blows to the head and concussions,
8 many available to view via videos on hockeyfights.com and youtube.com. One hit to his
9 head was so severe, he broke his orbital bone.

10 208. Despite suffering significant head injuries, Todd was pressured to return to
11 play even when suffering lingering cognitive symptoms because teams implied he may
12 lose his job if he stayed out. He estimated he experienced dozens of concussions and
13 likely uncountable numbers of subconcussive hits during his time in the NHL due to
14 fighting and other hits.

15 209. After the 1996-1997 season, Todd required a double knee surgery and
16 subsequently retired from the NHL after trying out for the Phoenix Coyotes. Todd
17 coached various youth hockey teams, including coaching seminars with USA hockey
18 where he wrote USA hockey manuals and coaching handbooks. Todd also stayed in
19 touch with the Ducks franchise, attending their 20th anniversary weekend in October
20 2013.¹⁶

21 210. Although he was a fighter on the ice, Todd Ewen had a career after hockey
22 as a writer, artist, inventor, father, and husband. Todd pursued and completed numerous
23 education opportunities, including licensing as a real estate agent and investment broker
24 and an Associate's Degree in Information Technology.

25
26
27 ¹⁶ NHL, *Ducks Will Welcome Back Players from Original Team at Sunday's Throwback Night*,
28 NHL.com (Oct. 9, 2013), <https://www.nhl.com/ducks/news/ducks-will-welcome-back-players-from-original-team-at-sundays-throwback-night/c-686186>.

211. Todd's former teammates recalled that "[w]henver we were on the bus or on the plane after games he was always drawing things [and] making things with rolls of tape. He liked to create stuff with his hands."¹⁷ Todd was a "talented artist" who "spent much of his time working on his art."¹⁸ Another teammate remembered that "Ewen turned a wad of tape into a hockey helmet design, complete with an intricate Ducks logo." He said, "You would marvel at the detail he could put in them" and "the time, and patient and talent that had to go into that [was] remarkable."¹⁹ Teammates referred to Todd as a "Renaissance Man."

212. Todd also wrote and illustrated children's books, and dreamed of a career after hockey publishing his books. In 1993, Todd recalled reading his stories to his sons, at that time 4 and 1 years old. He described one of his stories about a frog called Hop:

[It is a] story about a frog who has the courage to be different. And about his friends, a dragonfly who reminds us of the importance of sharing our thoughts and fears and a ruffian cat who shows us that we can learn to enjoy and have fun with boys and girls who are different from ourselves.²⁰

213. In 1993, Steve Bisheff wrote of Todd: "Fighting and writing is what seems to keep Ewen going these days. That and this dream he has. The dream that someday A Thug Named Todd might eventually become more famous for A Frog Named Hop."

214. After hockey, Todd proved to be multi-talented, ambitious, and remarkably skilled. Todd excelled in numerous areas of employment. Although immediately successful as a stock broker, Todd decided to return to college in the early 2000s to obtain an Information Technology degree. In 2010, he began his own realty company with his wife Kelli, the Ewen Realty Group, and obtained a real estate license. He even worked

¹⁷ *Id.*

¹⁸ *Supra* note 11.

¹⁹ *Supra* note 12.

²⁰ Robyn Norwood, *A Kid at Heart: Ducks' Enforcer Ewen Creates Children's Books*, LA Times (Feb. 2, 1994), http://articles.latimes.com/1994-02-02/sports/sp-18101_1_todd-ewen/1

1 on developing a television series showcasing hockey related ice-skills that he called the
2 Ice Force Challenge.

3 215. Todd was also an apt inventor, developing numerous inventions, five of
4 which obtained patents. His inventions included a hockey pants mug/ cup and shot glass,
5 a hockey “coach’s bag” designed to allow coaches to easily carry all of the equipment
6 they needed, and a portable and collapsible portfolio for real estate agents to carry signs,
7 displays, and other materials. Todd also created real estate “socks” designed to cover the
8 sharp edges on real estate signs from damaging car interiors. Todd sought to manufacture
9 his cup and shot glasses on a large scale.

10 216. Although he never learned musical theory or how to read sheet music, Todd
11 also taught himself how to play the piano, guitar, bass, and drums.

12 217. Drawing on his hockey experience, Todd also excelled as hockey coach.
13 Todd coached for USA Hockey and worked as the Coaching Director of the Chesterfield
14 Hockey Association. Todd made several coaching videos with championship promoters
15 and participated in USA Hockey coaching seminars. Todd coached every level of youth
16 hockey, from mini-mite to midget major, and coached both Lafayette High School and
17 the Saint Louis University Billikens College Ice Hockey team.

18 218. Todd proved to be an exceptional coach. In 2008, just before Todd took
19 over coaching at Saint Louis University, the men’s hockey team struggled to a record of
20 7-24-1. Within two years, however, Todd took the Billikens to first place in regular
21 season and a playoff Championship in the Mid-America Collegiate Hockey Association.
22 Todd helped the Billikens more than triple their wins from just years before, finishing
23 26-5-1-1 overall.

24 219. Todd was deeply respected and well-liked among the Billikens players, with
25 many writing to Todd that he had inspired them to be successful not just on the hockey
26 rink, but afterwards. However, Todd felt obligated to quit coaching after his memory and
27 ability to focus weakened. Uncharacteristically, Todd began forgetting practices and
28 events and chose to end his brief coaching career.

1 220. After coaching, Todd and other NHL alumni developed the Collegiate
2 University Junior Scouting and Reporting (“CUJ”) program, a franchise scouting
3 program to help profile college and amateur hockey players for NHL franchises. As part
4 of the CUJ, Todd held seminars and developed videos to help scouts assess player traits
5 and attributes that would translate into a potential NHL career. The CUJ not only
6 showcased Todd’s acumen for hockey and training, it showed his shrewd ability to
7 identify unique initiatives and drive to make them become a success.

8 221. Todd’s list of accomplishments outside of the NHL are as numerous and
9 impressive as his accolades as an NHL player. However, as Todd grew older, his ability
10 to turn his dreams and ambitions into reality deteriorated.

11 222. Unlike many Enforcers of his era, Todd rarely drank alcohol and never took
12 illegal drugs. But, as did many other Enforcers, Todd suffered from depression and
13 worsening cognitive issues. Soon after his NHL career, Todd began suffering headaches,
14 dizziness, memory loss, mood swings, sleeplessness, ringing in his ears, and nausea.
15 After 2010, Todd grew increasingly unable to focus on work and decided to stop coaching
16 hockey because he became uncharacteristically unreliable and inattentive. According to
17 his family, despite being a loving and devoted family man, Todd started suffering from
18 confusion and some bouts of anger.

19 223. Todd grew increasingly concerned that his symptoms were the result of the
20 head hits he experienced in the NHL, including his many fights. Kelli Ewen recounted
21 that, “[e]very time it was announced that a fellow player had died with CTE, Todd would
22 say, ‘if they had CTE, I know I have CTE.’ He was terrified by the thought of a future
23 possibly living with a degenerative disease that could rob him of his quality of life, and
24 cause him to be a burden to his family.”

25 224. Todd witnessed the struggles of many of his former NHL colleagues,
26 especially the Enforcers and big hitters. Between 2011 and 2016, a series of former NHL
27 players died or committed suicide at young ages, and many were later diagnosed with
28 CTE. The list of players includes:

- 1 • Derek Boogaard, nicknamed “The Boogey Man,” one of the largest and
2 most feared fighters in NHL history, died of an accidental drug overdose in
3 2011 at 28 years old. His brain was found to have extensive damage from
4 CTE;
- 5 • Bob Probert, the heavyweight champion of the NHL, died at 45 after battling
6 addictions related to drugs and alcohol. Researchers found he had
7 significant CTE;
- 8 • Steven Montador, a rugged defender who played nearly 600 games, died
9 unexpectedly in 2015. Researchers found he had significant CTE;
- 10 • Barry Potomski, a fighter in the mid-1990s, died of a heart attack in 2011 at
11 the age of 38 years old;
- 12 • Rick Rypien, a short but stout fighter who dominated the AHL and NHL,
13 committed suicide at the age of 27; and
- 14 • Wade Belak, a player whose Enforcer-status was pushed on him due to his
15 size. Wade suffered from depression for years, and reportedly took his life
16 in 2011

17 225. Many other former players have lived and died with CTE, and many now
18 suffer with neurocognitive issues likely due to CTE, which can only be diagnosed
19 posthumously.

20 226. Sadly, Todd joined the list of former NHL players who suffered a tragic end.
21 Todd succumbed to worsening cognitive deficits and depression and to a growing fear
22 that he had an incurable, degenerative brain disease that would rob him of his quality of
23 life and burden his family. On September 19, 2015, Todd committed suicide.

24 227. Todd’s suicide shocked his friends and fellow teammates. Few knew of the
25 seriousness of his struggle with CTE. His death devastated his family. As one writer
26 noted, “[t]he hardest part of [Todd’s death] is the effect it will have on Ewen’s family.
27 When someone takes their own life, their family is left to wonder what went wrong, what
28 could have been done to help prevent it and how they move on. That is who I am thinking
about. Ewen’s wife and kids.” Todd’s family believed he was a victim of CTE developed

1 during his time as an Enforcer in NHL. Many of Todd's friends agreed, expressing their
2 belief that only CTE could explain why Todd would commit suicide.

3 228. Despite being a writer, an artist, an inventor, a husband, and a father, the
4 NHL pigeonholed Todd into becoming an "Enforcer," a "Goon," and "The Animal." The
5 NHL encouraged Todd to fight, and implied that he would have no place in the league if
6 he refused to do so. Because of the NHL, Todd, like many of the Enforcers of his era,
7 paid the ultimate price.

8 **B. Kelli Ewen Unwittingly Donates Todd's Brain for Evaluation by the**
9 **NHL's Concussion Litigation Expert, Dr. Lili-Naz Hazrati.**

10 229. After Todd's shocking suicide, his widow Kelli was contacted by the St.
11 Louis Blues Alumni Association to arrange for the donation of Todd's brain for CTE
12 analysis. Kelli agreed, and Todd's brain was sent to the Canadian Concussion Centre
13 ("CCC") and Dr. Lili-Naz Hazrati, a neuropathologist.

14 230. The CCC is a Canadian organization out of the Krembil Neuroscience
15 Centre in Toronto that is reportedly interested in "examining the possible correlation
16 between repeated concussions and late deterioration of brain function."

17 231. In obtaining Todd's brain tissue, Dr. Hazrati told Kelli that she was an
18 independent and neutral neuropathologist who believed that CTE was a genuine disease.
19 Subsequently, the NHL announced that Dr. Hazrati was one of its hired experts in the
20 NHL Concussion Litigation MDL proceedings, and Dr. Hazrati testified that she did not
21 believe CTE was a degenerative disease or even caused any symptoms.

22 232. Dr. Hazrati purportedly examined Todd's brain tissue for CTE according to
23 a process she deemed reliable, and determined that the tissue showed no presence of CTE.
24 Dr. Hazrati widely publicized her conclusions in the media.

25 233. Unbeknownst to Kelli Ewen at the time, Dr. Lili-Naz Hazrati staunchly
26 denied that CTE was a disease or caused any ill effects at all. Dr. Hazrati stated in early
27 2018 that she believed "CTE has never been shown to correlate with any symptoms
28 during life" and described CTE simply as "a pattern [of tau protein] seen on a slide" that

1 cannot be classified as a “disease because it has never been proven that it actually causes
2 any symptoms.” Even for players Dr. Hazrati agrees had CTE, like Steve Montador, she
3 emphasizes that although “the deposits of tau sort of look . . . the way it is described in
4 the consensus paper [for CTE] . . . that does not mean that, although I see that pattern [of
5 tau associated with CTE], it does not mean that this explains all his symptoms . . . or
6 [that] he had a disease.”

7 234. Dr. Hazrati asserted that it is “impossible to state with a reasonable degree
8 of medical certainty that concussions or subconcussive impacts cause neurodegenerative
9 tauopathies to form in the brains of athletes.” She claimed, despite its association with
10 Alzheimer’s disease, CTE, and other neurocognitive illnesses, “the presence of p-tau in
11 a patient’s brain at autopsy, on its own, cannot confirm whether or not the patient
12 exhibited clinical symptoms of [neurocognitive decline] during life.” Remarkably, she
13 has also asserted that there are no “scientifically reliable research that demonstrates a
14 cause and effect relationship between subconcussive and concussive impacts and any
15 [neurocognitive disorders].”

16 235. In 2017, Dr. Hazrati signed onto a letter arguing “There is a disconnect
17 between the categorical rhetoric in media and news releases describing ‘concussion’
18 research on the one hand, and the muddled and contentious scientific reality on the other
19 [T]he pathology and link between head impacts and long-term neurological
20 conditions such as CTE is still unclear, with questions of causation yet to be settled.”²¹
21 The letter encouraged parents not to be concerned about head hits children may receive
22 in contact sports like hockey and football.

23 236. Not only did Dr. Hazrati deny that CTE was a disease, but the NHL also had
24 hired her as an expert in the NHL Concussion Litigation. The NHL paid Dr. Hazrati \$500
25 per hour to write a report and to testify on its behalf in opposition to the view that repeated
26

27 ²¹ Jason Chung, et al., *Does CTE call for an end to youth tackle football?*, Start Tribune (Feb. 10, 2018),
28 <http://www.startribune.com/does-cte-call-for-an-end-to-youth-tackle-football/473655913>.

1 head hits and concussions cause long-term neurocognitive disorders, including CTE. Dr.
2 Hazrati's status as an expert on behalf of the NHL created a conflict of interest for any
3 neuropathological evaluation she performed on any athlete, but especially on behalf of
4 former NHL players who sued the NHL claiming it failed to protect them against or
5 disclose the serious, and well-established consequences of repeated head trauma that
6 occurred in contact sports like hockey.

7 237. Indeed, Dr. Hazrati's most recent published paper on CTE reads like a
8 propaganda piece for the NHL's denial defenses.²² Her new paper includes no new
9 research, but makes broad claims about the illegitimacy of CTE based on a handful of
10 case studies. For example, she claims Dr. Bennett Omalu and Dr. Ann McKee have come
11 to conflicting conclusions about the features of CTE, and therefore, CTE supposedly
12 lacks a clearly identifiable neuropathological presentation. Yet, the features Dr. McKee
13 discusses occur in "advanced stages of CTE," while Dr. Omalu examined features in
14 individual who fit earlier stages of CTE. Additionally, Dr. Hazrati claims the symptoms
15 of CTE are simply a "self-fulfilling prophecy" caused by media misreporting and
16 fearmongering.

17 238. Neither the NHL nor Dr. Hazrati informed Kelli Ewen of the numerous
18 conflicts of interest with Hazrati examining Todd's brain. Rather, the Dr. Hazrati
19 represented to Kelli Ewen that she would perform a legitimate and completely unbiased
20 evaluation of Todd's brain to determine whether he had CTE and that she was actively
21 researching the causes and effects of CTE. No one informed Kelli that Dr. Hazrati
22 actually rejected CTE as a disease. Moreover, neither the NHL nor Dr. Hazrati informed
23 Kelli that Dr. Hazrati had been retained or was in consideration to be retained as an expert
24 in the NHL's defense of ongoing concussion litigation brought on by former NHL players

25 239. Unaware of these conflicts of interest, Kelli agreed to donate Todd's brain
26 to the CCC and Dr. Hazrati for evaluation. Dr. Hazrati obtained Todd's brain without
27

28 ²² Nicole Schwab and Lili-Naz Hazrati, *Assessing the Limitations and Biases in the Current Understandings of Chronic Traumatic Encephalopathy*, 64 J. Alzheimer's Disease 1067 (June 7, 2018).

1 ever disclosing her position on CTE or her association with the NHL. In fact, Dr. Hazrati
2 asserted that she was an unbiased party who would work with other physicians to confirm
3 her ultimate diagnosis. Had she disclosed her conflicts of interest, Kelli would never
4 have sent Todd's brain to Dr. Hazrati or to the Canadian Concussion Centre for
5 neuropathological evaluation.

6 240. Dr. Hazrati performed her neuropathological evaluation on Todd's brain,
7 and on February 10, 2016, released her conclusions that Todd did not have CTE. Dr.
8 Hazrati asserted in her accompanying press release that "These results indicate that in
9 some athletes, multiple concussions do not lead to the development of CTE" and that her
10 "findings continue to show concussions can affect the brain in different ways" underlying
11 "the need to not only continue this research, but also to be cautious about drawing any
12 definitive conclusions about CTE until we have more data."

13 241. The news that Todd did not have CTE shocked and devastated the Ewen
14 family. While a CTE diagnosis is tragic, it would have explained Todd's symptoms and
15 suicide, and his worsening cognitive issues. Paul Montador, the father of Steve
16 Montador, a former NHL player reported to have suffered from significant depression,
17 worsening memory and other cognitive issues, described the "bittersweet" emotions of
18 learning his son had CTE: "I've lost a son, on the one hand. And that can't be changed.
19 But [Steve's CTE diagnosis] brings some small sense of explanation as to why these
20 things were happening to him – and that he had no control over them."

21 242. The NHL predictably exploited Todd Ewen's story for its own benefit, using
22 Hazrati's CTE findings to undermine the legitimate and serious neurocognitive disorders
23 faced by many former NHL players. Ignoring the several Enforcers who had been
24 diagnosed with CTE, Gary Bettman, in a letter to Connecticut Senator Richard
25 Blumenthal, highlighted Todd Ewen's suicide, blaming his decision to commit suicide
26 on supposed "fear mongering" by the media and plaintiffs' lawyers:

27 This, sadly, is precisely the type of tragedy that can result when plaintiffs'
28 lawyers and their media consultants jump ahead of the medical community

1 and assert, without reliable scientific support, that there is a causal link
 2 between concussions and CTE. Certainly, a more measured approach
 3 consistent with the medical community consensus would be a safer, more
 4 prudent course.

5 243. Like the NHL, others also highlighted Dr. Hazrati's conclusions to
 6 undermine the significance and prevalence of CTE, claiming that "fear overshadows
 7 facts" with "Football and CTE."²³ Another journalist used Ewen's death and lack of CTE
 8 diagnosis to claim that:

9 The modern sports landscape seems to be caught in what Harvard Professor
 10 Ellen Langer would call 'entrapment by category.' The media has painted a
 11 picture of football as it relates to concussions, and concussion as it relates to
 12 CTE. All too often, concussions appear in headlines as having a direct link
 13 to suicide. This sort of rigidly compartmentalized thinking is lazy at best.
 14 It is harmful at worst, as in the case [Todd] Ewen, but more often and
 15 perhaps more important, it halts progress.²⁴

16 244. Others claimed that the "[d]eath of Todd Ewen, former NHL Enforcer found
 17 not have CTE, shows how little we know about brain injuries" and blamed Ewen's and
 18 other athletes' symptoms on "other contributing factors" such as "anxiety, chronic pain,
 19 sleep apnea, addictions," criticizing the alleged "rush to presume CTE."²⁵

20 245. Dr. Hazrati likewise exploited her report on Todd's brain to spread her
 21 beliefs that CTE is not a legitimate disease and that it is not shown to cause any cognitive
 22 complications. In one article, she blamed Todd's suicide on allegedly misleading
 23

24 ²³ Eric Adelson, *Football and CTE: Fear Overshadows Facts*, Yahoo (Mar. 21, 2016).

25 ²⁴ Jim Davis, *We need to talk about mental illness in athletics*, GlobePost (Jun. 29, 2018).

26 ²⁵ Scott Stinson, *Death of Todd Ewen, former NHL enforcer found not to have CTE, shows how little we*
 27 *know about brain injuries*, Nat'l Post (Feb. 16, 2016), [https://nationalpost.com/sports/hockey/nhl/death-](https://nationalpost.com/sports/hockey/nhl/death-of-todd-ewen-former-nhl-enforcer-found-not-to-have-cte-shows-how-little-we-know-about-brain-injuries)
 28 [of-todd-ewen-former-nhl-enforcer-found-not-to-have-cte-shows-how-little-we-know-about-brain-](https://nationalpost.com/sports/hockey/nhl/death-of-todd-ewen-former-nhl-enforcer-found-not-to-have-cte-shows-how-little-we-know-about-brain-injuries)
[injuries](https://nationalpost.com/sports/hockey/nhl/death-of-todd-ewen-former-nhl-enforcer-found-not-to-have-cte-shows-how-little-we-know-about-brain-injuries)

1 information about the prevalence of CTE, saying “He thought he had CTE. He was
2 convinced. He was very afraid. That might have pushed him to do what he did.”²⁶

3 246. In her expert report on behalf of the NHL in the MDL proceedings, she used
4 her findings on Ewen’s neuropathological report to support her view that a “the current
5 scientific research regarding CTE actually suggests that head impacts alone are not
6 sufficient to cause CTE pathology.” She wrote that “[i]n 2016, I reported my findings on
7 Todd Ewen. Despite having a 15 year history of exposure to head impacts and exhibiting
8 clinical symptoms described in current CTE case series, Ewen’s brain did not contain any
9 pathology consistent with CTE.”

10 247. Publicly, when discussing Todd Ewen, Hazrati said that “another lesson to
11 take away here is to remember that not everyone who has a concussion will get CTE,”
12 that “[w]hat I hope is that people who have concussions won’t kill themselves because
13 they think they have CTE. We’re still in the very early stages of understanding the
14 disease.”²⁷ She stated that Ewen’s biopsy “results indicate that in some athletes, multiple
15 concussions do not lead to the development of CTE.”²⁸

16 248. Dr. Hazrati continues to exploit her findings on Todd Ewen, including in her
17 June 7, 2018 published paper on CTE. There, Hazrati again asserted the symptoms of
18 CTE are largely media-driven and not the results of an underlying disease. She claims
19 Todd Ewen’s case is proof:

20 Many news outlets are citing suicidality, dementia, and executive
21 dysfunction as inevitable in the end stages of CTE, resulting in a self-
22 fulfilling prophecy for some who fall into the “at-risk” population of contact
23 sports players. For example, a professional hockey player [Todd Ewen]
presented with some common symptoms of CTE and was convinced he had

24 ²⁶ *Supra* note 23.

25 ²⁷ Rick Westhead, *Researcher sheds light on exam of former NHL player Todd Ewen’s brain*, TSN (Feb.
26 10, 2016), <https://www.tsn.ca/talent/researcher-sheds-light-on-exam-of-former-nhl-player-todd-ewen-s-brain-1.436245>.

27 ²⁸ Press Release, *Canadian Concussion Centre Releases Ewen Brain Autopsy Results*, Canadian
28 Concussion Centre (Feb. 10, 2016).

1 developed the disease. The player committed suicide, but postmortem
2 examination revealed no pathological evidence of CTE.

3 **C. Boston University and the Mayo Clinic Find Todd Ewen Had CTE,**
4 **Concluding Dr. Hazrati's Evaluation Was "Faulty" and "Incomplete."**

5 249. After receiving Dr. Hazrati's findings, Todd's family sought to have his
6 brain re-examined. The Ewen family requested Dr. Ann McKee at the Boston University
7 Center for CTE, one of the world's foremost experts, evaluate Todd's brain tissue.

8 250. Upon receiving the tissue slides from Dr. Hazrati, Dr. McKee immediately
9 recognized the slides were "faulty" and "incomplete." Dr. McKee suspected the slides
10 had not been properly stained with AT8, an antibody administered to "stain" the brain for
11 testing. AT8 and other similar antibodies are necessary to view tau protein deposits in
12 brain tissue, a necessary step to determining whether or not an individual has CTE.
13 Without properly staining the brain tissue, it is impossible to accurately conclude whether
14 or not the tissue shows signs of CTE.

15 251. Dr. McKee sent the brain slides to her lab for processing. The findings
16 confirmed that:

17 The original slides provided by The Hospital for Sick Children were found
18 to be entirely nonimmunoreactive for AT8 when stained at the VA-BU-CLF
19 brain bank. However, when additional brain tissue was re-blocked at the
20 VA-BU-CLF brain bank into new paraffin-embedded slides, some of the
21 same, initially negative, brain regions were found to be immunoreactive for
22 AT8, suggesting that processing of the original slides may have altered the
23 immunoreactivity of the tissue. Also, when the VA-BU-CLF team re-
24 blocked the fixed tissue fragments with more extensive sampling of brain
25 regions commonly affected in CTE, those brain regions were found to
26 contain multiple CTE lesions.

27 252. Thus, by properly processing Todd Ewen's brain tissue for
28 neuropathological analysis for CTE and engaging in proper "sampling of brain regions
commonly affected by CTE," Dr. McKee was able to readily diagnose "multiple CTE
lesions" in those regions.

1 253. Dr. McKee was forced to remedy Dr. Hazrati's significant errors (one
2 Hazrati, incredibly, never realized). Dr. McKee's lab reblocked Todd's brain tissue and
3 properly stained the slides. Dr. McKee then proceeded to perform her own evaluation.

4 254. In 2018, Dr. McKee diagnosed Todd Ewen with Stage II (of IV) CTE.

5 255. Dr. McKee found "[s]cattered neurofibrillary tangles (NFTs) . . . present in
6 the superior frontal cortex bilaterally and a focus of perivascular NFTs and neuropil dots
7 . . . present in the left superior frontal cortex . . . [and] [r]are NFTs are also found in the
8 inferior frontal and superior frontal cortex." Moreover, she found that "[t]here are
9 multiple CTE foci, consisting of dense clusters of NFTs, neuropil threats and neuropil
10 dots in the frontal pole and superior frontal cortex, primarily at the depths of the sulci.
11 The intervening cortex also shows scattered NFTs and neuropil threats."

12 256. To confirm her analysis, Dr. McKee requested examination by three other
13 neuropathologists at Boston University - Thor Stein, M.D., Ph.D., Dr. Bertrand Huber,
14 M.D., Ph.D., and Dr. Victor Alvarez, M.D. All agreed that Todd Ewen had Stage II (of
15 IV) CTE.

16 257. Seeking further consensus, Dr. McKee sent Todd's brain tissue to the Mayo
17 Clinic for another independent evaluation. Dennis W. Dickson, M.D., a Neuropathology
18 Consultant at the Mayo Clinic and Kevin, F. Bieniek, Ph.D., a Neuropathology Research
19 Fellow at Mayo Clinic, performed the analysis. The Mayo Clinic similarly found "Tau
20 pathology (predominantly neurofibrillary tangles (NFT)) and neuropil threats, as well as
21 subpial and focal perivascular thorn-shaped astrocytes (TSA) . . . present in the superior
22 frontal and the frontal gyri. There are also scattered NFT [in the] superficial cortical
23 layers. Subpial TAS are found at the depth of select cortical sulci."

24 258. Dr. Dickson and Dr. Dennis concluded Ewen's brain showed "cortical tau
25 pathology consistent with Chronic Traumatic Encephalopathy." They wrote that the
26 "pathology is characterized by cortical NFT preferentially located in upper cortical layer,
27 as well as patchy subpial and perivascularneuronal and glial tau pathology often at the
28 depths of sulci. The latter lesions are considered pathognomonic of CTE."

1 259. The Mayo Clinic concluded “The CTE stage is consistent with Stage 2” –
2 the same conclusion reached by Dr. McKee and Boston University.

3 260. After remedying Dr. Hazrati’s errors, five different neuropathologists and a
4 neuropathological fellow from two different institutions of the highest academic
5 distinction all agreed that Todd Ewen had Stage II CTE.

6 261. Dr. Hazrati had ample opportunity to recognize that her lab had not properly
7 processed Todd’s brain tissue. Dr. Hazrati indicated that, after she receives slides
8 containing processed brain tissue, she examines them, takes notes, takes photographs,
9 and performs her entire analysis over the course of several days.

10 262. Despite “several days” of analysis, Dr. Hazrati never realized Todd’s brain
11 tissue was improperly processed.

12 263. Dr. Hazrati’s mishandling of Todd Ewen’s brain and neuropathological
13 analysis calls into question her other neuropathological reports and in fact, any conclusion
14 she has ever reached regarding CTE. Hazrati herself has stated that she alone is
15 responsible for “screening all of the brains” donated to the Centre, including those with
16 a “previous history of professional football or . . . professional athletes.” She relies on
17 many of her own neuropathological evaluations to support her conclusions that CTE is
18 not a disease, is not caused by head hits, and is not associated with any cognitive
19 symptoms.

20 264. Dr. Hazrati’s neglect caused the Ewen family significant pain. At his death,
21 Kelli and Todd’s colleagues and friends “were sure Todd must have [had] CTE.” As
22 Todd’s colleagues explained, CTE was the only result that made sense to them and could
23 explain Todd’s suicide.²⁹

24 265. When Dr. Hazrati announced her faulty findings, Kelli Ewen was shocked.
25 Without CTE to point to, the Ewen family blamed themselves, suffering emotional
26
27

28 ²⁹ *Supra* note 11.

1 distress and significant guilt. As Dr. Tator of the CCC acknowledged upon receipt of
2 Todd's brain:

3 It's important to find out why a person would take their life, or why a person
4 shows signs of mental deterioration . . . Very often with our brain donation
5 project, the majority (of donors) have shown during their lives some
6 evidence of brain degeneration, and so to try to help families deal with what
7 they have observed, it's important to exam the brain to see what it was. Was
8 it Alzheimer's or a tumor, or something else?

9 266. Rather than provide the family closure, Dr. Hazrati's analysis provided the
10 family turmoil. Todd, during life, expounded the significance of CTE and privately
11 agreed with the need to remove fighting and head hits from the game. Yet, because of
12 Dr. Hazrati's wrongful analysis of Todd's brain, he became a "poster boy" for the NHL
13 and CTE-deniers, who argue the risks of head hits in hockey are overblown.

14 267. Todd's death can no longer be exploited to justify the NHL's complete lack
15 of concern over head hits and violence on the ice. Rather, his death and CTE diagnosis
16 should be a motivating force for positive change in NHL gameplay, and is further
17 evidence that repeated head hits experienced in the NHL by players lead to long-term
18 neurocognitive deficits.

19 **THE STATUTE OF LIMITATIONS IS TOLLED**

20 268. The Statute of Limitations is tolled for three reasons (1) Todd Ewen's CTE
21 was not diagnosed until 2018 and Todd's claims did not accrue until that time, (2) the
22 pendency of a Class Action lawsuit against the NHL tolled Todd Ewen's claims, and (3)
23 the NHL fraudulently concealed Todd Ewen's claims by preventing former NHL players
24 from learning of the dangers of repeated head hits in NHL gameplay, including the long-
25 term neurocognitive complications they cause, and by fraudulently omitting information
26 from former players about the dangers of repeated head hits despite knowing players
27 relied on the NHL to enact appropriate player safety measures.

28 269. First, Todd Ewen first had a reasonable factual basis for a cause of action
when Dr. McKee completed her brain biopsy and report and diagnosed Todd with CTE

1 in 2018. Dr. Hazrati's neuropathological report presented incorrect findings that
2 prevented Kelli Ewen from knowing that Todd suffered CTE, and therefore, Ewen's
3 claims were tolled until she learned of Todd's brain damage through Dr. McKee's report.

4 270. Second, the pendency of the class action in the District of Minnesota tolled
5 Todd Ewen's claims. The Supreme Court has held that a purported class member in a
6 proposed class action may bring his claims at a later date despite a statute of limitations
7 because the class member's claims are tolled during the pendency of the proposed class
8 action. Because the District of Minnesota denied a motion to certify a class action on
9 July 13, 2018, Ewen's claims were tolled until that date.

10 271. Third, the NHL fraudulently concealed Todd Ewen's claims. The NHL
11 knew that repeated head hits cause long-term neurocognitive complications. However,
12 the NHL actively and deliberately sought to prevent current and former NHL players
13 from learning that fact. To this day, the NHL continues to deny that repeated head hits
14 cause long term neurocognitive complications and misrepresent scientific research on
15 CTE, especially the similarities between head hits in football and hockey. In fact, the
16 NHL used Todd Ewen's death and its own expert Dr. Hazrati's flawed neuropathological
17 assessment of Todd's brain to continue to claim CTE is not caused by head hits that
18 players experience during NHL gameplay and to assert Todd could not present a
19 colorable claim. Additionally, despite assuring players that it would take appropriate
20 measures to protect players, the NHL continues to promote violence and fighting, sending
21 the message, as it always has, that head hits are an appropriate part of NHL gameplay
22 and do not present a significant risk or concern. Although the NHL knew, or should have
23 known, of the dangers of repeated head hits, the NHL fraudulently omitted information
24 about the risks of head hits, head trauma, and concussions occurring during NHL
25 gameplay, including during fights. Former NHL players, including Todd Ewen, relied
26 on the NHL for information about player safety. Because the NHL deliberately
27 undermined the ability of former players, including Todd Ewen, to learn that head hits
28

1 experienced during NHL gameplay contribute to later neurocognitive complications,
2 Ewen's claims against the NHL were tolled.

3 **CLAIMS FOR RELIEF**

4 **COUNT I**

5 **Negligence**

6 **on behalf of the estate of Todd Ewen**

7 272. Plaintiff re-alleges the foregoing paragraphs as if fully set forth herein.

8 273. The NHL has historically and voluntarily assumed an independent tort duty
9 of reasonable care regarding player safety and head trauma. The NHL has admitted that
10 it has always assumed the duty to manage player safety, particularly with regard to head
11 injuries and concussions. Likewise, it has stated and implied to NHL Players, including
12 Todd Ewen, that they could rely on the NHL to promote and protect player safety. Having
13 accepted, both by its actions and statements, the duty to protect NHL players, the NHL
14 had an obligation to discharge this duty non-negligently.

15 274. The NHL also had a duty of reasonable care to act in the best interests of the
16 health and safety of NHL players, to provide truthful information to NHL players
17 regarding risks to their health, and to take all reasonable steps necessary to ensure the
18 safety of players.

19 275. As part of this duty of reasonable care, the NHL was required to keep NHL
20 players, including Todd Ewen, informed of neurological risks of head injuries suffered
21 while playing hockey in the NHL, and not to omit material information about the risks of
22 negative long-term effects or permanent neurological damage that can occur from head
23 injuries incurred while playing hockey.

24 276. The NHL breached that duty of reasonable care to its players by:

- 25 (a) creating, fostering, and promoting a culture of extreme violence, including
26 head hits and violence from fighting, where head trauma to NHL players,
27 including Todd Ewen, was a natural and common corollary;
28

- 1 (b) by failing to inform NHL players, including Todd Ewen, and all other NHL
2 players, about the scientific research on the negative health effects of head
3 trauma and about anecdotal evidence of the negative health effects of head
4 trauma from its own NHL players;
- 5 (c) failing to warn players of the potential negative effects of head injuries
6 suffered while playing in the NHL, including but not limited to that repeated
7 head hits might cause the development of CTE and that continued playing
8 might expose them to irreversible brain damage and neuro-cognitive
9 impairment through blows to the head;
- 10 (d) failing to adequately address the continuing health risks associated with
11 concussive events, sub-concussive events, and/or brain injuries that the NHL
12 players sustained;
- 13 (e) failing to make any statements of substance about concussions, MTBI,
14 and/or other head injuries;
- 15 (f) by deliberately discrediting the association between repeated head hits and
16 the development of CTE and other neurocognitive conditions, and
17 downplaying the long-term neurocognitive effects of repeated head hits
18 experienced by Todd Ewen and other former NHL players.
- 19 (g) turning a blind eye to the risks to players of repetitive sub-concussive and
20 concussive head impacts, and
- 21 (h) by avoiding any proper study of concussions and other head injuries.

22 277. As a direct and proximate result of the NHL's negligence and the breach of
23 its duty of reasonable care, Todd Ewen suffered innumerable head hits, both during NHL
24 gameplay and during the 150 fights he partook in throughout his NHL career. Those hits,
25 including those causing his concussions, directly led to his development of his CTE and
26 CTE-like neurological symptoms, including memory loss, confusion, behavioral
27 changes, and depression. Todd's head trauma eventually led to his suicide.
28

1 experiencing repeated concussive and subconcussive hits may develop long-term
2 neurocognitive disorders, (2) NHL players frequently experience concussive and
3 subconcussive hits during NHL gameplay, (3) participating in fights during games may
4 cause concussive and subconcussive hits, (4) each consecutive concussion results in a
5 decreased ability to fully heal, (5) concussions and subconcussive hits cause cumulative
6 damage that worsens over time with each subsequent hit, (6) any player who experiences
7 a concussion should not return to the same game in which they were injured or they may
8 suffer further permanent brain damage, and (7) players who suffer a concussion should
9 not return to play until all of their symptoms are absolved or they may suffer further
10 permanent brain damage.

11 283. The NHL concealed material facts and information with the intent to prevent
12 NHL players, including Todd Ewen, from learning of the types of harm described above.

13 284. To this day, the NHL continues to downplay and deny the long-term
14 neurocognitive effects of repeated head hits and the link between head hits and CTE,
15 leading former NHL players to believe that the neurocognitive symptoms they suffer
16 from are not a result of their head hits during their time in the NHL.

17 285. Todd Ewen and other NHL players justifiably relied on the NHL's guidance
18 and its representation that fighting and violence in NHL games was an appropriate and
19 acceptable health risk for NHL players. Had Todd Ewen known of the well-established
20 relationship between repeated head hits and long-term neurocognitive disorders, Todd
21 could have reduced or eliminated the amount of time he spent fighting, limited his
22 exposure to contact with his head during NHL gameplay, and made other choices to
23 reduce the potential issues he faced. Instead, Todd Ewen continued to play in the NHL
24 and continued to participate in fights because he relied on the NHL to ensure his safety
25 and the safety of other players. The NHL, both implicitly and expressly, stated that there
26 was no proof that head hits, even serious ones, were dangerous to NHL players.

27 286. As a direct and proximate result of the NHL's failure to warn Todd Ewen of
28 the true, known risks of repeated head hits in NHL gameplay, Todd suffered serious

1 injuries, including but not limited to long-term neurological damage, and serious
2 symptoms and disorders resulting from that damage, include CTE.

3 287. As a result of the NHL's misconduct, the NHL is liable to Plaintiff, and
4 Plaintiff seeks the full measure of damages allowed under applicable law.

5 **COUNT III**

6 **Fraudulent Concealment**

7 **on behalf of the estate of Todd Ewen**

8 288. Plaintiff re-alleges the foregoing paragraphs as if fully set forth herein.

9 289. The NHL knowingly and fraudulently concealed from Todd Ewen material
10 information about the long-term risks of playing in the NHL, including that players
11 experiencing repeated concussive and subconcussive hits may develop long-term
12 neurocognitive disorders, that NHL players frequently experience concussive and
13 subconcussive hits during NHL gameplay, that participating in fights during games may
14 cause concussive and subconcussive hits, that each consecutive concussion results in a
15 decreased ability to fully heal, that concussions and subconcussive hits cause cumulative
16 damage that worsens over time with each subsequent hit, that any player who experiences
17 a concussion should not return to the same game in which they were injured or they may
18 suffer further permanent brain damage, and that players who suffer a concussion should
19 not return to play until all of their symptoms are absolved or they may suffer further
20 permanent brain damage and are at a higher risk of a repeat concussion.

21 290. The NHL knew, intended to induce, and expected that Todd Ewen would
22 reasonably rely on its concealment of the risks and long-term effects of head injuries
23 suffered while playing in the NHL.

24 291. Todd Ewen reasonably relied on the NHL during and after his career to his
25 detriment. Because of the NHL's denial of the known dangers of repeated head hits,
26 Todd Ewen continued to fight in the NHL, accumulating 150 fights over his 11-season
27 career, and thereby suffering numerous head hits. After his career, the NHL continued
28

1 to represent that playing hockey in the NHL did not lead to long-term neurocognitive
2 deficits.

3 292. The NHL's actions and omissions were committed willfully, maliciously,
4 with intent to allow injury and damage to Todd Ewen and other NHL players, and with
5 reckless disregard of the players' health and safety, in order to keep players in the dark
6 about the dangers of concussions, subconcussive hits, and other head injuries and to allow
7 the NHL to continue to profit off of violence and fighting in hockey.

8 293. Had Todd Ewen known of the well-established relationship between
9 repeated head hits and long-term neurocognitive disorders, Todd could have reduced or
10 eliminated the amount of time he spent fighting, limited his exposure to contact with his
11 head during NHL gameplay, and made informed choices to potentially limit the head
12 trauma to which he was exposed, and to which he exposed other players. Instead, Todd
13 Ewen continued to play in the NHL and continued to participate in fights because he
14 relied on the NHL to ensure his safety and the safety of other players and the NHL, both
15 implicitly and actively, stated that such head hits did not endanger NHL players.

16 294. As a direct and proximate result of the NHL's fraudulent concealment of the
17 true, known risks of repeated head hits in NHL gameplay, Todd suffered serious injuries,
18 including but not limited to long-term neurological damage, and serious symptoms and
19 disorders resulting from that damage, include CTE.

20 295. In addition, the NHL fraudulently concealed Todd Ewen's CTE diagnosis.
21 The St. Louis Blues Alumni Association, an agent of the NHL, arranged for Todd's brain
22 to be evaluated by Dr. Lili-Naz Hazrati. The NHL failed to disclose to Kelli Ewen
23 numerous conflicts of interest.

24 296. The NHL's undisclosed expert, Dr. Hazrati, concluded Todd Ewen did not
25 have CTE. Dr. Hazrati and the NHL used Todd Ewen's results as evidence that NHL
26 gameplay did not cause CTE and blamed Todd's symptoms and suicide on "fear-
27 mongering" by the media and plaintiffs' attorneys.

1 to the head and concussions, the NHL negligently breached its duty to reasonably protect
2 players from and adequately inform players about the risks of head hits. Because of the
3 NHL's negligence, failure to warn, and fraudulent omissions, Todd Ewen and other NHL
4 players suffered repeated hits to the head and concussions not knowing that such hits
5 increased their risk of long-term neurocognitive deficits and disease.

6 308. Because Todd Ewen was unaware of the dangers of repeated head hits, he
7 continued to participate in fights, continued to play hockey in the NHL, and could not
8 take informed measures to limit his exposure to head hits or ensure he had fully healed
9 before returning to play. Todd Ewen, thereby, suffered from numerous head blows as an
10 NHL player, including severe blows to his head during the 150 fights he participated in
11 over his 11 season, 546 game career in the NHL. The numerous and brutal hits to the
12 head Todd experienced, including many that resulted in concussions, caused Todd to
13 develop CTE and other neurocognitive deficits.

14 309. After Todd retired from the NHL, he experienced significant depression,
15 memory loss, confusion, anger, dizziness, mood swings, nausea, and other symptoms.
16 Todd became increasingly concerned that, because of his likelihood of having CTE, he
17 would become a burden on his family and may deteriorate to the point where he could
18 not care for himself. Todd feared his quality of life would be robbed by CTE. Over just
19 more than a decade after retiring from the NHL, Todd went from one of the strongest,
20 fastest skaters in the NHL, and a witty, intelligent artist and writer, to man who was
21 increasingly withdrawn with marked changes in behavior, personality, and memory.
22 With CTE, Todd became a shadow of himself, almost unrecognizable to his loved ones.

23 310. On September 19, 2015, Todd Ewen, as a result of his suffering from CTE
24 and its associated symptoms, including memory loss, confusion, behavioral changes,
25 angry outburst, and depression. Todd Ewen was only 49 when he committed suicide.

26 311. Prior to and after Todd's death, Kelli Ewen experienced significant grief
27 over the loss of the devoted family man she had married. Prior to his suicide, Todd
28 withdrew from his family and suffered behavioral and mood issues that severely impacted

1 his relationship with his wife, family, and friends. Kelli lost substantial quality time with
2 her husband both before and after his death because of his CTE symptoms and worsening
3 depression and cognitive health. Because of the NHL's negligence, failure to warn, and
4 fraudulent omissions, Kelli lost her husband and best friend at tragically young age, and
5 was robbed of the many memories, experiences, stories, conversations, and emotions that
6 she and Todd might have had if the NHL had not acted tortiously.

7 312. As a result of the NHL's misconduct, the NHL is liable to Plaintiff, and
8 Plaintiff seeks the full measure of damages allowed under applicable law.

9 **PRAYER FOR RELIEF**

10 313. WHEREFORE, Plaintiffs pray for judgment with respect to their Complaint
11 as follows:

- 12 • Granting compensatory damages and all other damages allowed by law;
- 13 • Plaintiffs their costs and disbursements in this action, including reasonable
14 attorneys' fees, to the extent permitted by law; and
- 15 • Granting Plaintiffs all other relief allowable at law or equity.

16 **DEMAND FOR JURY TRIAL**

17 314. Plaintiffs demand a trial by jury on all issues so triable.
18
19
20

21 Respectfully submitted,

22 ZIMMERMAN REED, LLP

23 Date: April 30, 2019

24 By: /s/ Christopher P. Ridout

25 Christopher P. Ridout

26 Caleb Marker

27 2381 Rosecrans Avenue, Suite 328

28 Manhattan Beach, CA 90245

(877) 500-8780 Telephone

(877) 500-8781 Facsimile

1 ZIMMERMAN REED LLP

2 Brian C. Gudmundson (*pro hac vice* anticipated)

3 Michael J. Laird (*pro hac vice* anticipated)

4 80 S 8th Street, Suite 1100

5 Minneapolis, MN 55402

6 (612) 341-0400 Telephone

7 (612) 341-0844 Facsimile

8 CORBOY & DEMETRIO, P.C.

9 William T. Gibbs (*pro hac vice* anticipated)

10 33 N. Dearborn, Suite 2100

11 Chicago, IL 60602

12 (312) 346-3191 Telephone

13 (312) 346-5562 Facsimile

14 *Attorneys for Plaintiffs*